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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. FRANK LEONARD LEDESMA, JR. et al., Defendants and Appellants.	A125441 (Alameda County Super. Ct. No. CH39529)

On the night of March 11, 2005, Sergio Dueñas was shot and killed, and Carlos Castañeda was wounded, in a drive-by shooting in Hayward. Frank Ledesma, Sr. (Ledesma Sr.), his son Frank Ledesma, Jr. (Ledesma Jr.), and José Mesaramos (collectively, appellants) were arrested shortly after a police pursuit. Mesaramos was identified as the driver of the suspect vehicle, and the Ledesmas were identified as the shooters.

After a joint trial lasting more than a month, all three were convicted by a jury of the first degree murder of Dueñas (Pen. Code, § 187, subd. (a); Count 1),[1] with a special circumstance finding that the murder was intentional and committed by shooting from a vehicle at a person outside it with intent to inflict death (§ 190.2, subd. (a)(21)). Appellants were also convicted of two counts of attempted murder (§§ 187, 664; Counts 2 and 3). Mesaramos was convicted of unlawful driving or taking of a vehicle

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

(Veh. Code, § 10851, subd. (a); Count 4), and Ledesma Sr. was convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1); Count 5). The jury also found that, inter alia, appellants committed the murder and attempted murders for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and that all three appellants personally and intentionally discharged a firearm proximately causing great bodily injury or death, within the meaning of former section 12022.53, subdivision (d). Each appellant was sentenced to life without the possibility of parole for the murder, two consecutive determinate terms of seven years on the attempted murders, and two consecutive terms of 25 years to life, plus a 20-year term, for the firearm enhancements. Ledesma Sr. and Mesaramos were each sentenced to an additional two-year term, to run concurrently, on Counts 4 and 5.

Appellants seek reversal of their convictions on a number of grounds. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Prosecution's Evidence

Witnesses to the Shooting

Oscar Martinez testified through a Spanish interpreter. In March 2005, Martinez lived in Hayward at 1067 Inglewood Street, between Gading and Underwood Streets. Many members of the Norteño street gang lived in Martinez's neighborhood. Before moving to Hayward, Martinez had lived in Los Angeles for four years and was a member of Tortilla Flats, a Sureño gang. Martinez has the number one tattooed on his left elbow and the number three on his right elbow. Martinez got the tattoos in Hayward and often wore blue because he wanted people to know he was a Sureño.

On March 11, Martinez and his friends, Castañeda and Dueñas, were at Dueñas's apartment. At around 9:00 p.m., Martinez asked Castañeda for a ride home. Castañeda drove Martinez home in a small black four-door car. Castañeda parked the car in front of Martinez's house, facing toward Underwood Street. Martinez and Castañeda got out of

the car. Martinez asked Castañeda to return a car stereo he had loaned him.[2] Castañeda opened the hood, asked Martinez to help remove the cables, and then sat back down in the driver's seat. Dueñas remained seated in the front passenger seat. Martinez was standing at the open driver's door, talking to Castañeda, when he saw a small red two-door car with its headlights on, driving toward Gading Street at about 10 miles per hour. Three men were in the car.

Martinez next saw the red car approaching with its headlights off, driving toward Underwood Street. The car stopped next to Castañeda's car, and Martinez noticed a person in the front passenger seat and someone sitting behind him in the back seat. The person in the front passenger seat was "a little bit chubby," had short hair and a mustache, and was wearing a white hooded long-sleeved sweater. He was older than his companions. The front passenger was also holding a shotgun, which was about two feet long, in both hands. The shotgun was pointed through the red car's open window at Martinez and at Castañeda's car. The man in the backseat was 18 or 19 years old, "a little bit chubby," wearing a white shirt, and had short hair and a "little bit of a mustache." The driver was around 18 or 19 years old, thin, and had "long hair with a tail." Martinez described the hairstyle as the "Norteños Mongola."

Martinez heard a shot and glass shattering. He ran towards the back of the car and then the house. As he ran, he heard another shot. The red car was stopped for about three seconds and then drove away "very fast." Martinez, Castañeda, and Dueñas ran inside the house. Both Castañeda and Dueñas had been shot. Dueñas had been shot in the chest and immediately fell down. Martinez tried to stop the bleeding from Castañeda's head. After 911 had been called, the police and an ambulance arrived.

[2] Martinez had not originally mentioned the car stereo to police because he had stolen it.

Martinez gave a statement to police the same night.[3] Martinez also later identified the red car used in the shooting and identified appellants as its occupants. At trial, Martinez identified Ledesma Sr. as the man he had seen holding the shotgun. Martinez identified Mesaramos as the driver of the red car. He also identified Ledesma Jr. as the rear passenger.[4] When the red car drove past, neither Martinez nor his two friends yelled, flashed gang signs, gestured, or said anything to the men in the car. Neither Martinez nor his two friends had any weapons.[5] "14," which meant Norteños, had been spray painted on the sidewalk in front of Martinez's house, but Martinez did not know when.

Castañeda testified that he lived in Hayward in March 2005. Before that he lived in Los Angeles. Castañeda is a member of the 18th Street gang, a Sureño gang. Castañeda has Sureño tattoos, including "L.A." on his arm and "18" on his finger. He has three dots below his left eye. He also has "Sur" and "18" tattooed on his stomach. He did not have a nickname, but Dueñas and Martinez called him "18" because he is "a member of the 18 gang." Castañeda was not sure whether Martinez was a Sureño or had any tattoos, but he had a nickname, "Smiley." He did not know whether Dueñas was a Sureño or had tattoos.[6]

On the night of March 11, Castañeda met Martinez and Dueñas at Dueñas's apartment. Castañeda drove them to Martinez's house in his black four-door Toyota Corolla. Castañeda testified that they parked in front of Martinez's house and had planned to install a stereo that Castañeda was buying from Martinez. Martinez got out of

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[3] In his statement, Martinez said that he did not know what kind of weapon was used in the shooting.

[4] On cross-examination, Martinez was asked: "[Y]ou didn't see [Ledesma Jr.] do anything. He was just sitting there. Right?" Martinez responded: "Yes."

[5] On cross-examination, Martinez acknowledged that the police found .22 caliber ammunition in his house on the night of the incident. He denied, however, that he had a firearm.

[6] On cross-examination, Castañeda testified that Dueñas's nickname was "Gallo Negro."

the car on the passenger side. Martinez was standing outside next to Dueñas, who remained in the front passenger seat of the Toyota.

A red car, facing in the opposite direction, pulled up beside the Toyota and the occupants started shooting. At the time, the hood of the Toyota was up and Castañeda was bending down in the driver's seat, using a screwdriver and pulling out wires to install the stereo.[7] Castañeda believed he heard more than four shots. Castañeda felt pain on his left side and in his neck. No one said anything before or after the shots. Castañeda did not see who was in the car. Castañeda did not hear anyone yell before the shooting. Nor, was there any fight. Neither Castañeda, Martinez, or Dueñas made any gesture or displayed weapons.

At the time of trial, Castañeda was in custody because he had been convicted of felony carjacking.

The Police Pursuit

Around 10:12 p.m. on March 11, 2005, Sergeant Roger Keener[8] and Officer Lunger were responding to the reported shooting at 1067 Inglewood. They stopped for a red light at the intersection of Santa Clara and Jackson, going southbound, and heard that a red car had been seen leaving the scene. Keener and Lunger simultaneously saw a red car approaching. When they got closer to the red car, Keener could see the right rear passenger, who was in his late teens or early 20's and wearing a white baseball cap. The rear passenger turned around and looked directly at Keener and Lunger for a few seconds. Another responding officer had seen a red Saturn that matched the vehicle description at the intersection of Santa Clara and Jackson. The officer saw three people in the car and recognized Mesaramos, from prior police contacts, as the driver.

[7] At the time of the preliminary hearing, Castañeda testified that he was removing the stereo, rather than installing it.

[8] Unless otherwise specified, all law enforcement officers were members of the Hayward Police Department (Department) and titles reflect positions held at the time of their initial involement with the case.

Keener and Lunger followed the car and were able to move behind the red car, which took the northbound Highway 880 on-ramp. Keener and Lunger activated their red and blue lights, and the red car immediately moved to the right. The red car first slowed down and then "took off." It drove on the shoulder past other cars and got onto 880. Keener and Lunger activated their siren and pursued the car at speeds up to 90 miles an hour, but were unable to keep up with it. Keener and Lunger lost sight of the car between Lewelling and Marina Boulevards.

Officer Craig Fovel found a red Saturn crashed on the Marina Boulevard off-ramp. The vehicle was facing westbound when it should have been pointing eastbound and had "front-end damage." Fovel confirmed that nobody was inside and notified police dispatch. He noted the car had two doors and both windows were rolled down. Keener and Lunger went to the Marina Boulevard exit and identified the Saturn as the vehicle that they had been pursuing.

Based on information he received from witnesses, Fovel also notified police dispatch and the responding units that two people were seen "running from the area of the red vehicle in an eastbound direction, one person was seen running in a southbound direction."[9] One of the witnesses said he saw someone drop a long gun along the fence line. Three guns were ultimately found in the bushes—a loaded shotgun, a .45 caliber pistol, and a revolver with "an emblem of Goofy" on the handle. The revolver's cylinder contained four live rounds, one expended round, and had one empty chamber. One live round was in the pistol, and its magazine was empty.

Keener and Lunger drove down Marina Boulevard and turned right on Teagarden, going southbound. Keener saw a single pedestrian on Teagarden. The pedestrian was "casually" walking back toward Marina Boulevard. Lunger recognized Mesaramos.

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[9] One witness, who was a security guard at the center, testified that he heard a crash and then saw three men running from a car. He later identified appellants as being the same men he saw running.

When Keener and Lunger approached Mesaramos, he claimed that his name was José Meza.

Keener noticed that Mesaramos was "breathing heavy." Keener asked Mesaramos where he was coming from, but got no response. Keener put his hand on Mesaramos's chest and asked him why his heart was beating so fast. Mesaramos did not respond. Mesaramos was detained and later taken to the Department, where his tattoos were photographed. Mesaramos had one dot and four dots on his elbows.

Around midnight, Keener went to the nearby Ford dealership because a witness said he had seen a person removing a white sweatshirt as he walked from Marina Square toward the dealership. Ledesma Sr., whom Keener recognized, was found hiding in the left rear wheel well of a pickup truck. Ledesma Sr. was wearing blue jeans and a white long-sleeved hooded sweatshirt that was turned inside out. A black glove was found about 100 feet from Ledesma Sr.

Around 10:00 p.m. on March 11, Officer David Cerruti drove into the parking lot of the Marina Square Shopping Center and heard a description of the suspects' clothing, which included a white T-shirt. Cerruti noticed a man, wearing a white T-shirt, "walking briskly" through a pedestrian breezeway. The man was breathing heavily, had an injury to his eye, and appeared to be sweating. After Cerruti and the man made eye contact, the man "shot across" the parking area. Cerruti got out of his car and detained the man, Ledesma Jr., at gunpoint. A light-colored truck pulled up and someone said: " 'He's the one that ran from a car accident' " and " 'he hid something in a bush.' " A pair of black gloves were found in the bushes.

The Police Investigation at 1067 Inglewood

Around 10:12 p.m. on March 11, 2005, Officer Ryan Cantrell was dispatched to 1067 Inglewood Street. He observed a black Toyota Corolla parked in front of the house. The car was facing Underwood and on the north side of the street. The driver's side door was open. The windshield was damaged and the driver's side and rear driver's side windows were "broken out." The windshield and doors had bullet holes and damage consistent with a shotgun blast. Cantrell found wadding from a shotgun shell on the

dashboard. Five bullet casings from a .45 caliber semiautomatic weapon, bullet fragments, and a pellet from a shotgun shell were found in the street. One bullet fragment was under a vehicle parked in the driveway, and another bullet fragment was found on the floorboard, under the steering wheel, of the Corolla.[10]

Medical Evidence

On March 11, 2005, Dr. Ramon Snyder, a trauma surgeon, treated Castañeda and Dueñas. Castañeda had three penetrating wounds. He had a neck wound that was consistent with buckshot. Castañeda also had two larger, round wounds on the left upper back and left back or arm or shoulder region that were consistent with gunshot wounds.[11]

Dueñas was pronounced dead on arrival, at approximately 10:45 p.m. Dueñas had a penetrating, circular wound in his left upper arm that was consistent with a gunshot wound. There was no exit wound. An autopsy determined that he died from a bullet wound to the chest. A bullet was removed from his right pleural cavity.

Evidence Processing of the Two Cars

Around 10:53 p.m. on March 11, 2005, Crime Scene Technician Rommel Soriano responded to the location where the Saturn had crashed. Soriano processed the car's exterior, but was unable to obtain any fingerprints. He also photographed and searched the interior. He found a black puffy jacket and a baseball cap in the back seat. A red

[10] On cross-examination, Cantrell testified that there were what could have been two bullet holes on the passenger side of the car, which was pointing away from the street, towards the house. Cantrell also said that the holes could have been created by someone trying to fix a dent in the fender.

Castañeda was shown photographs of his car taken after the shooting. He said that the Toyota had not had shattered driver's-side windows or been "full of holes" before the shooting. However, the car had holes on the passenger side that had been there before the shooting. Castañeda testified that he made those holes while trying to pull out a dent in the car.

[11] In 2007, Castañeda was brought from prison to the Santa Rita jail. He went to the medical clinic where he had a bullet removed from the wound just below his left armpit.

expended shotgun shell was found under the baseball cap. The Saturn was then taken to a secured area in the back lot of the Department.

On March 14, 2005, Crime Scene Technician Jennifer Kell processed, for evidence, the red Saturn and the black Toyota, which were parked in the police department's rear lot. Kell noticed that the Toyota's windows were damaged and a tire was flat. There was a hole above the handle on the driver's-side rear passenger door and small holes or dents in the door frame between the driver's and rear passenger's doors. Damage to the interior indicated that the rear passenger door was open during the shooting. "[S]mall little pellets" were used. Interior damage in a "cluster shape" on the passenger side of the windshield indicated "the path of where the pellets landed." There were "small round pellets" on the dashboard below the cluster. There were also holes consistent with pellets on the right side of the windshield. Kell also found pellets under the passenger seat, on the front floorboard and on the driver's side. There was broken glass on the dashboard and driver's side floorboard.

Shotgun wadding was found on the Toyota's rear passenger floorboard and the front passenger dashboard. A through-and-through hole was located just above the handle of the rear door on the driver's side. A trajectory rod indicated that the bullet would have passed in between the two front seats.[12] Kell found another hole, about an inch and a half long, inside the hood area "near the front passenger tire wheel-well area," which indicated the hood was up when the damage occurred.[13] Kell collected the glass samples from the floorboard, the pellets from different areas of the car, and the plastic shotgun wad.

Kell also processed the red Saturn. She noticed that the windows were down, a key was stuck in the ignition, the passenger side of the car was undamaged, but the front-

[12] Kell was not trained on how to use the trajectory rods. She had only read the instructions enclosed with the kit and was using the rods to help document what she saw.

[13] On cross-examination, Kell testified that she did not know if two holes found in the right front fender of the Toyota were bullet holes.

end of the driver's side had damage. A through-and-through hole was in the glass of the sunroof, which was at a 30 degree angle, and the metal portion of the roof had another hole, which was at a 14 degree angle. After peeling back some of the interior metal, a bullet fragment was recovered resting at the top of the car on the right passenger side, with scraping from the hole toward the passenger side where the bullet rested.[14] Kell collected the bullet fragment from the Saturn and tested the steering wheel and driver's side roof for gunshot residue.[15]

The gloves, guns, bullet fragments, shotgun shells, and casings were taken to the crime lab for examination. Gunshot residue kits were used to collect samples from appellants and the victims, which were tested. Deoxyribonucleic acid (DNA) reference samples were also obtained from appellants.

Loss of the Cars

At the end of March 2005, both cars were moved from the back police lot and released to an auto dismantler called Pick-n-Pull. Inspector Robert Coffey, the lead investigator in this case, was aware of the release and initially authorized it. He did not know whether he notified the district attorney about authorizing the release. To Coffey's knowledge, at the time of the release, no defense attorneys or inspectors had sought to inspect the cars.

Coffey did not recall why the cars were not retained. One reason he did not want the cars in the rear lot was because it had a limited number of spaces and was also used for employee parking. In July 2005, after Ledesma Sr.'s attorney attempted to inspect the cars and learned they had been released, Judge Alfred Delucchi signed an order directing the Department to preserve the two cars. At that time, the vehicles were no longer in the

[14] The Saturn had been reported stolen on March 6, 2005. The car's owner testified that the rear windows did not roll down. He also viewed the car and reported that the sunroof had not been damaged before it was stolen.

[15] Kell did not think that her examination would be the last opportunity to examine the cars. She took no measurements. She was not a ballistics expert and merely documented what she observed and did not analyze the evidence.

Department's possession but were located, within a few days, at Pick-n-Pull. A few days later, Judge C. Don Clay also signed an order directing that the cars be returned to the Department.[16]

The vehicles were recovered and transported to a police facility located on Barnes Court, where Ledesma Sr.'s defense attorney and investigative team viewed the vehicles. In April 2008, one of Coffey's supervisors told him the cars had disappeared again. He did not authorize a second release. He last saw the cars at the Barnes Court facility. The wheels were missing at the time. He did not know what happened to the cars after he saw them. They were never found again.

Firearms Examination

Michelle Dilbeck, the supervising criminalist at the Alameda County Sheriff's Office Crime Lab, testified as an expert in firearms and toolmark identification. Dilbeck examined the shotgun recovered from the area where the Saturn had crashed and determined that it used 12-gauge shotshells. Dilbeck also examined a .357 magnum caliber Arminius revolver. The revolver contained one fired Winchester Western .357 magnum cartridge case, three unfired copper-washed Winchester Western .357 magnum cartridges, and one unfired copper-jacketed Fiocchi .357 magnum cartridge. Dilbeck also examined a Llama .45 auto caliber semiautomatic pistol. There was one unfired Remington-Peters Golden Saber .45 caliber brass-jacketed hollow-point cartridge and an

[16] The first order, dated July 18, 2005, stated: "IT IS HEREBY ORDERED that the Alameda County District Attorney's Office and the . . . Department shall retain in its possession all physical evidence seized in this case including the 1993 Saturn SW red two-door vehicle, license no. 5AJH743 and the black 1993 Toyota Corolla four door, license no. 3DRW938, both cars it took into its custody upon investigating the above-captioned case. This order shall remain in effect for the duration of this case." The second order, dated July 27, 2005, stated: "IT IS HEREBY ORDERED that the Alameda County District Attorney immediately recover the [Saturn and the Corolla] that were previously in police custody in this case . . . and store said vehicles in a secure space for the purpose of permitting defense inspection and testing of both vehicles. [¶] Said vehicles shall be recovered and placed in a secured storage facility no later than Monday, August 1st, 2005 by 9:00 am."

empty .45 caliber magazine with the gun. Dilbeck test-fired the shotgun and the pistol, which functioned normally. Initially, Dilbeck was unable to test-fire the revolver because the cylinder lock was not functioning properly. Later, the laboratory received two remote firing devices and Dilbeck was able to test-fire the gun.

Dilbeck examined five fired Remington-Peters .45 auto cartridge cases recovered from the shooting scene and concluded that all five had been fired from the Llama pistol. Dilbeck also examined five bullet fragments, including one recovered from the roof of the Saturn. They were all fragments from brass-jacketed .45 caliber hollow-point bullets. All five fragments had been fired from the Llama pistol.

Dilbeck examined an expended shotshell from the back seat of the Saturn. She compared it to the test-fired shells and the results were inconclusive. However, the expended shell was the same type as the unfired shells that were with the shotgun, Winchester Xpert steel shot 12-gauge shotshells.

Dilbeck determined that the bullet removed from Dueñas was a nominal .38 caliber copper-washed bullet with six lands and grooves and a right-hand twist. She compared the bullet with a test-fired bullet from the revolver and the results were inconclusive. However, Dilbeck determined that the class characteristics, the rifling, the size, and the number of lands and grooves were all the same. The revolver was the only gun that "was chambered to fire . . . .38 caliber ammunition."

Dilbeck examined another bullet fragment that had been removed from the left side of Castañeda's upper torso. When she compared the fragment with the bullet test-fired from the Llama pistol, the results were inconclusive. However, she determined that the class characteristics of the fragment, "six lands and grooves with a right-hand twist," were consistent with those of the .45 caliber semiautomatic pistol. The Llama pistol was the only one of the three guns that was "chambered to fire a .45 auto ammunition." Dilbeck collected "trace" DNA swabs from each of the three guns.

Gunshot Residue Evidence

Laurie Kaminski, a forensic scientist, testified as an expert in gunshot residue (GSR) examination. She tested the GSR kits from the steering wheel and interior

passenger door of the Saturn. Both were positive for GSR. Kaminski opined that both surfaces may have been "in close proximity to a firearm as it was discharged, or the particles could have resulted from a transfer."

Kaminski also examined GSR kits taken from appellants. At least one hand sample from each appellant was positive for GSR. Kaminski concluded that each "[e]ither . . . fired a firearm, was in close proximity to a firearm as it was discharged, or the particles resulted from a transfer." She could not conclusively say whether any of the three fired a gun.

Kaminski also examined GSR samples taken from Martinez, Dueñas, and Castañeda. At least one hand sample from each victim was positive for GSR.[17] Kaminski concluded that each victim "either . . . fired a firearm, was in close proximity to a firearm as it was discharged, or the particles resulted from a transfer." If a person was standing within up to 15 feet of blasts from a shotgun, a .45 caliber gun and a .357 gun, all pointed in his direction, and that person either suffered a bullet wound, placed his hands on a wound, or put his hands up to his face as multiple shots were fired, it would not be unusual to find gunshot residue on that person's hands or clothes. If there is contact, gunshot residue on a person's hands can transfer to clothing or another person.

Because in this case, firearms were involved and people were shot, Kaminski did not think that "a finding of gunshot residue on anybody is that unusual."

DNA Expert Testimony

Jumana Latif, a criminalist with the Alameda County Sheriff's Office Crime Laboratory, testified as an expert in forensic DNA examination and analysis.[18] She

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[17] For example, Martinez's right-hand sample included two particles containing lead, barium and antimony, three particles containing lead and antimony, three particles containing barium with aluminum, and one lead particle. The left-hand sample consisted of one particle containing lead, barium and antimony, three particles containing lead and antimony, and one particle containing barium with aluminum.

[18] At the time of her testimony, appellants did not challenge Latif's qualification as an expert or the validity of the methods she used. At the conclusion of her testimony, Mesaramos's trial counsel moved to strike her statistical testimony on the ground that she

performed DNA analysis, using the short tandem repeat (STR) method, on several pieces of evidence: a single black glove, a pair of black gloves, and swabs collected by Dilbeck from the three firearms. For each swab analyzed, Latif looked at either nine or 13 loci, depending on the quantity of DNA extracted. Latif also developed DNA profiles from DNA samples obtained from appellants.

The DNA profile developed from the inside of the single glove indicated a mixture of two individuals, which included a major profile and a minor profile. She compared those profiles with those of appellants and concluded that the major profile was consistent with Ledesma Sr.'s DNA profile. Latif testified that the probability of identifying a random person with the same profile was "1 in 36.21 quadrillion Caucasians, 1 in 116.9 quadrillion African Americans, and 1 in 3.041 quadrillion southwest Hispanics." Latif eliminated Ledesma Jr. and Mesaramos as contributors to the mixture.

When Latif analyzed DNA obtained from the inside of the pair of gloves, she developed a DNA profile with a mixture of at least two individuals, with a major and minor profile. Following a comparison with appellants' profiles, Latif concluded that Ledesma Jr. "cannot be eliminated, so he's included as a contributor to this mixture . . . ." Latif was asked "how rare is this profile in the population?" She responded: "[T]he numbers are 1 in 275.6 quadrillion Caucasians, 32.5 quadrillion African Americans, and 164 quadrillion southwest Hispanics." Ledesma Sr. and Mesaramos Jr. were eliminated as contributors.

Latif analyzed five swabs taken from the shotgun and found that four were "complicated mixtures from at least three individuals." She noted: "Some of the DNA at some locations was consistent with all three suspects, but at other locations it was not consistent, and I was not able to come up with any definitive conclusions." She could not

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was "not an expert on statistics." Ledesma Jr. and Ledesma Sr. joined in the motion, but made no additional comments. The motion was denied.

eliminate or include appellants as contributors.[19] The fifth swab contained only a "[v]ery, very small amount, trace DNA," which was not useful.

Latif also analyzed two swabs from the revolver. The profile developed from the swab labeled 2-1, which came from cartridges from the cylinder, indicated a mixture of two individuals. Neither Ledesma Sr. or Ledesma Jr. could be eliminated as contributors, but Mesaramos was eliminated as a contributor.[20] Latif did not compute statistics on this mixture profile. She developed a separate DNA profile for a swab from the grip of the revolver and concluded that it was consistent with Ledesma Sr.'s profile. Ledesma Jr. and Mesaramos were eliminated as contributors. This profile occurred in "1 in 4.261 trillion Caucasians, 1 in 10.61 trillion African Americans, and 1 in 1.436 trillion southwest Hispanics."

Latif conducted a DNA analysis of two swabs from the semi-automatic pistol. Both profiles developed indicated a mixture of two individuals. The mixture included a minor female component. Ledesma Sr. and Ledesma Jr. were eliminated, but Mesaramos "cannot be eliminated." As to one swab, Latif concluded that "the probability of including a random person to this mixture profile is estimated to be 1 in 157,300 Caucasians, 1 in 420,000 African Americans, and 1 in 157,300 southwest Hispanics." For the other swab, "the probability of including a random person is estimated to be 1 in 181,900 Caucasians, 1 in 249,600 African Americans, and 1 in 186,300 southwest Hispanics."

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[19] On cross-examination, Latif was asked: "Basically you're saying you can't draw any conclusions. Right?" She answered: "Yes."

[20] On cross-examination, Latif testified: "[This] means that their alleles are present in this evidence profile." She also testified that it was not a problem, for purposes of her analysis, that Ledesma Sr. and Ledesma Jr. were father and son. Latif said: "[T]he father and the son are not identical twins. They share one allele at every locus, but it's not an identical match; they don't share the same profile. If they were identical twins, then it could present a problem, but they share only one allele at every locus. The other allele comes from the mother."

Search of Appellants' Residences

Ledesma Jr.'s mother is Ana Maria Herrera.[21] Inspector Steven Schwartz conducted a search of Herrera's townhouse, in Walnut Creek, where Ledesma Jr. sometimes stayed. Herrera lived with two other sons, ages 10 and 13, and their father. Schwartz testified that Herrera identified the "southern-most" bedroom as the youngest son's and Ledesma Jr.'s room. In that bedroom and an upstairs hall closet, Schwartz found a 12-gauge Remington shotgun shell under the bed, a business card for the Alamo-Lafayette Cemetery where Ledesma Jr. worked, and several items with gang writing. Schwartz searched downstairs and found a backpack containing several baseball caps and several homemade compact disks (CDs) with gang writing. When asked, Herrera said the hats and CDs belonged to Ledesma Jr. and that she was "just going to get rid" of them.

At trial, Herrera testified that her two younger sons each had his own bedroom and that Ledesma Jr. slept on the couch downstairs. She also denied having previously told Schwartz that the south bedroom was her youngest son's and Ledesma Jr.'s room. She denied telling Schwartz that the baseball hats were Ledesma Jr.'s. Herrera did not recall anything about the CDs.

Alameda County Sheriff's Office Sergeant Colby Staysa served a search warrant, at 22236 Main Street, apartment F, in Hayward. Individuals affiliated with Norteño gangs were found inside the home. Staysa searched a bedroom Ledesma Sr. shared. Staysa found Ledesma Sr.'s ID card and some letters either to or from Ledesma Sr. Staysa also found various Norteño gang drawings throughout the house. One of the drawings was signed, "Artwork by Spanky Ledesma."

A search warrant was also served at Mesaramos's sister's residence where he had been known to reside at one time. Mesaramos's sister told the officers that Mesaramos spent time with other gang members in the "west addition" or "back side" of the house.

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[21] Ledesma Sr. is Ledesma Jr.'s father. Herrera and Ledesma Sr. separated when Ledesma Jr. was about 14 months old.

Inspector John Lage went to that area and saw Norteño graffiti on the walls. Lage searched a garage that had been converted into a bedroom and found gang indicia, including photographs, belts, and a wood carving. He also found a letter from a Southside Hayward gang member to Mesaramos that included references to the gang lifestyle, gang graffiti, and monikers.

Gang Expert's Testimony

Lage testified as an expert in the area of gang investigation and gang-related crime in the Hayward area. Lage testified that there are Norteño gangs in Hayward. Norteño is Spanish for Northerner and refers to "a wide allegiance of gangs that identify with the No. 14, which represents the letter N, but it means more for just Nuestra Raza, Nuestra Familia." Norteños also identify with the color red. Nuestra Familia, a prison gang, is at the top of the gang hierarchy with Nuestra Raza as its subordinate. All of the other Norteño criminal street gangs are subordinate to Nuestra Raza.

Lage testified that the Sureños were the "common adversary or enemy" of the Norteños. Sureños identify with the number 13 and wear the color blue. The 13th letter of the alphabet is the letter M, which represents the Mexican Mafia, a prison gang. "Sureño[s] or Southerner[s]" are "the collection of criminal street gangs that subordinate themselves to the Mexican Mafia, again, through the symbol of 13." Tortilla Flats and 18th Street are active and violent gangs in Los Angeles.

Southside Hayward is an informal Norteño gang with over 300 members and several subset gangs. DGF, which stands for "Don't Give a Fuck," Latin Crew, East Las Palmas, Hogs, and Donald Block Gangsters are subset gangs within Southside Hayward. Southside Hayward's turf is not precise, it claims "a turf of generally the south portion of [Hayward]," from approximately Harder Road south. However, the gang members are present throughout Hayward and other cities and counties. Lage has investigated "a couple hundred or more" crimes committed by Southside Hayward gang members. The gang engaged in a pattern of violent felony conduct, including homicide, manslaughter, and assault. Several of its members were recently convicted of felonies, including attempted murder, murder, and assault with a deadly weapon.

Northside Hayward is similar to Southside Hayward. It is an informal Norteño gang with more than 200 members. The gang identifies with the color red and the number 14. Some gang members claimed individual subset gangs, such as A Street Locos and Campo Ramos Locos. Northside Hayward's turf was generally north of Harder Road. Lage has investigated over 300 crimes committed by Northside Hayward members. He opined that the Northside gang's primary activities include the sale of drugs, unlawful homicide, and assault. Several of its members were recently convicted of felonies, including murder, assault, and possession of methamphetamine for sale. Ledesma Sr. was a Northside Hayward member convicted, in January 2004, of possession of methamphetamine for sale.

Traditionally Northside Hayward and Southside Hayward were rivals, but in recent years there has been a truce and they focused their enmity on Sureño gangs. Lage testified that turf or territory was very important to the local Norteño gangs. Norteños aggressively seek out rivals, or people they believe to be Sureños, who are on their turf and consider it an affront that they are there. Lage also testified that for gang members respect "is very much centered on intimidation and putting the fear in other people so that they will essentially defer to you, avoid you, be afraid of you." This gives "a great sense of power to the gang members." If a Norteño believed a Sureño was living in Southside Hayward on Norteño turf, it would be taken as an act of disrespect. Lage testified that Venture Market, located a block from the shooting at Gading and Inglewood Streets, was a popular hangout for Southside Hayward gang members.

Lage opined that appellants were gang members and testified in detail concerning the bases of his opinion, which included: admissions by appellants; field identification cards indicating gang association or involvement; items obtained in searches, such as letters, drawings, clothing, and photographs; microwriting seized while appellants were in custody; graffiti at their residences and on personal belongings and clothing; tattoos and nicknames; and statements to the police and Department of Corrections and Rehabilitation. Ledesma Sr. was a Norteño gang member, affiliated with Northside Hayward, A Street, and Nuestra Raza, which is also known as Northern Structure Prison

Gang. In Lage's opinion, on March 11, 2005, Ledesma Jr. was a Norteño gang member, affiliated with Southside Hayward. In Lage's opinion, on March 11, 2005, Mesaramos was a Norteño gang member, affiliated with Southside Hayward.

Lage was asked several hypothetical questions regarding a drive-by shooting committed by hypothetical gang members, which we discuss in detail *post* (part II.B.1.). In Lage's experience, drive-by shootings were a common method of criminal activity for Southside Hayward gang members. It was common to have multiple people in a car. Lage testified: "Even if there's only one shooter, everyone in that car garners a certain added status now because they took part in the crime, [it] tests their bonds and mutual loyalty not to inform, not to cooperate with the police, and . . . they're sharing the mutual risks not just of retaliatory violence . . . but [also] possible arrest by law enforcement.

Lage testified that it was not unusual that Ledesma Jr. was affiliated with Southside Hayward and his father with Northside Hayward. Moreover, there was no conflict because both men were Norteños.

Defense Evidence

Loss of the Two Cars

In August 2005, Officer Steven Kidwell met a tow truck at Pick-n-Pull in Newark to retrieve the Toyota and Saturn and return them to the Department's storage facility at Barnes Court. Kidwell signed a document indicating the vehicles were being released to the Department, which was responsible for them until the case was complete.

In August 2005, Sergeant Mark Mosier was contacted by John Jacobson, an employee of Forensic Analytical, who said he was hired by the public defender's office to perform investigative analytical work on the cars. Mosier called Jacobson and facilitated his examination of the cars at Barnes Court.[22] Jacobson provided a list of items he collected from the vehicles. Mosier wrote a supplemental report "acknowledging that and forwarding that to the D.A." Mosier had seen one court order,

[22] Jacobson examined the cars on behalf of Ledesma Sr. Mosier was never contacted by anyone on behalf of Ledesma Jr. or Mesaramos, with respect to the cars.

obtained by Ledesma Sr.'s counsel, dated July 27, 2005. Mosier understood that the cars were to be retained for the duration of the case. Mosier had no further contact with the cars and did not authorize anyone to release them.

In March 2008, a lawyer for Pick-n-Pull contacted the Department about the status of the cars. A search was made for the cars, but they could not be found. Sergeant Wydler, the property and evidence supervisor until July 2007, believed that he had released the vehicles. No paperwork could be located.

The Defense Firearms Expert

Patricia Fant, testifying as an expert in forensic firearms examination, said she was usually unable to determine bullet trajectory from a photograph. Looking at a photograph of the Toyota, Fant testified that she saw a hole that might be a bullet hole on the driver's-side rear door. She also could not determine whether two holes in the Toyota's right front fender were bullet holes. If she had the opportunity, she might have done a sodium rhodizonate test, a chemical test for lead, on the holes to determine whether they were, in fact, bullet holes. Fant testified that she would need to see the car, rather than a photograph, to determine trajectory. Kell had improperly taken photographs of the trajectory rods from an angle. It was not clear that Kell had placed the trajectory rods correctly. Fant also could not determine from the photographs whether any of the holes in the Toyota could have been made by someone sitting in the back seat of the Saturn. Fant was asked: "[I]f you were able to see everything, both cars, you might have been able to tell whether or not that person in the back seat could have fired a gun out that window and . . . inflicted any of the holes in that Toyota. Right?" She answered: "Yes, I could."

The Defense Gang Expert

James Hernandez, a professor of criminal justice at Sacramento State University, was called by Ledesma Jr. to testify as an expert on street gangs in California. Hernandez testified that drive-by shootings vary greatly. In his experience, they could be both organized, with a specific objective in mind, and spontaneous.

Hernandez was asked the following hypothetical question: "You've got a car with three people that are associated with a Norteño gang, all right? [¶] . . . [¶] They are not members but they definitely got ties with a Norteño thing . . . An eyewitness is involved and sees it happen just a few feet away, sees a person pointing a shotgun out the window that is shooting right into him, he sees a person on the same side of the car sitting in the backseat with the window up and sees him do nothing, no gun, no firing of gun, sees him doing nothing, and the person in the backseat is someone that just turned 18 or close to it, and a person that we just talked about has familial ties, maybe, let's say he's got a relative in the car . . . a father figure or whatever, is there any possibility that he's in that car other [than] a gang-related reason?" Hernandez replied: "Certainly."

Search at 1067 Inglewood

On March 11, 2005, Sergeant Chad Olthoff assisted in a search at 1067 Inglewood. He found a wooden box, containing .22 caliber rounds, on the mantel in the living room. He also found a pump-action BB rifle, with a layer of dust on it, behind a dresser in one of the bedrooms. Olthoff searched for evidence that the victims used a gun during the incident, but did not find any.

Ledesma Jr.'s DNA Expert

Thomas Fedor, a forensic DNA analyst at the Serological Research Institute, testified as an expert in DNA and DNA analysis. Fedor reviewed the DNA report prepared by Latif. Fedor said that Latif's finding, that Ledesma Sr. and Ledesma Jr. could not be eliminated as contributors to the mixture profile obtained from a cartridge in the revolver, did not necessarily mean that Ledesma Jr.'s DNA was on the cartridge. Fedor testified that Ledesma Jr.'s DNA might appear to be on the cartridge because his father's DNA was there and they are related. Fedor said: "It's possible that a better sample from the cartridge would have allowed a discrimination between the father and the son. And that's because, again, the father and son aren't exactly the same as each other. They are not identical twins. The son does have some features that he inherited from his mother. Those features are absent from the test result for [the revolver cartridges]. But had there been a more complete result for that item, it's possible that if

Ledesma Jr.'s DNA is there, we would have seen some of his maternal traits as well. As it happens, we don't." Fedor was asked: "And the way that this report is characterized, I seem to read it at first reading that it looks like a mixture of both of them on there. That's not the case, is it?" Fedor responded: "It need not be a mixture of both of them. It's possible that it's a mixture of both of them, and indeed a third person, because there's clearly something on that cartridge that could not have come from either father or son. But it's possible that there is only the mystery man and Ledesma, Sr., and that Ledesma, Jr.'s potential appearance there is related to the fact that his father is there. . . . It may be that [Ledesma Jr.'s maternal traits] are absent because he was never there. It may be they are absent because the sample wasn't sufficient. And, unfortunately, we can't tell which is which on the basis of the testing."

Fedor was asked: "So in some reports they give you a number, one in 426 quadrillion, is that stronger evidence than, for example, saying somebody can't conclusively be eliminated?" Fedor responded: "I would think that would be much stronger evidence, yes." Fedor testified, on cross-examination, that only nine loci were analyzed with respect to the swab from the cartridge. The other four loci "don't appear to have a result." Fedor was asked, by the prosecutor: "But nowhere was the conclusion made that absolutely these two individual's DNA profile is found on this DNA sample, right?" He answered: "No, of course not. That would have been outrageous." The prosecutor asked: "There was certainly no conclusions that seemed to indicate that the profile for [Ledesma Jr.] on this evidence sample was one in some large number?" Fedor responded: "No, that was absent, and I expect correctly so. I don't expect . . . that any statistic would approach the strength of a matching statistic that we often hear in . . . these cases."

Martinez's Prior Witness Statement

Officer Marco Ayala testified that, on the night of the shooting, he interviewed Martinez in Spanish. Martinez told Ayala that two friends, Dueñas and Fernando Perez, dropped him off at home. Perez's car would not start and he was doing something to the battery. Martinez did not tell Ayala anything about a car stereo. Martinez said that he

saw the front passenger of the red car with his arm extended, but he did not see the shooter's gun. Martinez also said the front passenger was wearing a white hooded sweatshirt and that all three passengers were around 18 or 19.

Ayala took Martinez to the police department and from there to an area where possible suspects had been detained. Martinez identified Ledesma Jr., saying, "That's him, that's him" and "something to the effect that he was the shooter." Martinez looked at Mesaramos and also identified him as one of the people in the car. Martinez identified Ledesma Sr. as the third passenger in the red car.

Ledesma Sr.'s Testimony

Ledesma Sr. was the only defendant who testified. He said that he went by the nickname Spanky, which was given to him when he was a child. He grew up in the A Street area of Hayward and associated with some guys who called themselves "A Street." He did not consider it a gang. He did some of the drawings that were shown to the jury. The references on the drawings to A Street referred to where he grew up.

Ledesma Sr. admitted he had several felony convictions and had spent time in Mule Creek Prison. But, he denied ever telling anyone at Mule Creek that he was a member of the Northern Structure or otherwise admitting gang membership. Ledesma Sr. admitted that he has "Norte," "Hayward," "A Street," "14," and huelga bird tattoos. He testified: "I put a lot of tattoos on me that I really didn't know what they meant, and I probably kind of regret it now, you know." Ledesma Sr. had a drug problem, but testified that he had used methadone clinics and counseling to stay off drugs.

Ledesma Sr. testified that, on March 11, 2005, he drove to a park in the afternoon. He was there about 10 minutes. He "drank a couple of beers, maybe a beer" and then left. Later in the day, Ledesma Sr. was "getting high" with "Tweaker Tommy." Then, "Tweaker Tommy" dropped Ledesma Sr. back near the park. He wasn't selling drugs, on March 11, 2005, but was "doing a lot." Ledesma Sr. didn't stay at the park long. He "drank a couple of beers, a beer, maybe," as well as one on the way to the park. He then ran into Mesaramos, who "might have been partying; he might have been doing nothing."

About 10 minutes later, while still at the park, Ledesma Sr. bought a .357 revolver and a shotgun from a man he had never met before.[23] The guns were loaded. Ledesma Sr. said he "was buzzed" at the time. Ledesma Sr. was asked: "How many beers did you have?" He responded: "All day? I don't know. Maybe one. I don't know. Two. I don't know. I like to drink."

Ledesma Sr. asked Mesaramos for a ride home. They left the park and were going to stop to get more beer. They picked up Ledesma Jr., about two blocks from the park, because he called Ledesma Sr. and said " 'Dad, pick me up. I'm drunk.' " When Ledesma Jr. got in the car, he said: " 'Oh man, dad, I'm buzzed.' " Ledesma Sr. was in the front passenger seat with the revolver on his lap and the shotgun between his legs. They drove up Inglewood and went to Venture Market, but it was closed. They made a U-turn and drove back down Inglewood. Ledesma Sr. saw four guys in front of a house. They drove past the house, and Ledesma Sr. asked Mesaramos to slow down because one of his friends lived on the street. Ledesma Sr. saw someone heading toward the passenger side of the car, holding what looked like a long revolver, and he thought the person was going to shoot him. He was afraid. He fired the revolver and "it got stuck." He then fired the shotgun and ducked in the car. No one outside the car had said anything or made any gang signs. Ledesma Sr.'s ears were ringing and he did not know if anyone else fired a gun. He never saw the .45 automatic pistol. Ledesma Sr. testified that he "didn't want to hit nobody."

The car drove off and crashed at the Marina Boulevard exit. Ledesma Sr. grabbed the shotgun and ran. He told the others to grab "the guns" and get rid of them. Both he and Ledesma Jr. were wearing gloves. On cross-examination by Ledesma Jr.'s counsel, Ledesma Sr. testified that Ledesma Jr. did not participate in the shooting. On cross-

[23] Ledesma Sr. said he had previously bought guns to resell for a profit. On cross-examination, he conceded that he knew that, as a convicted felon, he was prohibited from possessing guns.

examination by the prosecutor, Ledesma Sr. testified that he was not happy to see the police. He was asked: "Why not?" He responded: "We just shot weapons, man."

Stipulations

The parties stipulated that: (1) Ledesma Sr. has previously been convicted of a felony; (2) Counsel for Ledesma Jr. made an appointment with the prosecutor to examine the Saturn and the Toyota Corolla with a private investigator. The prosecutor arranged an examination date of January 6, 2009. The prosecutor was to provide the address for the cars' location to counsel, who would then relay the information to his private investigator. Counsel telephoned the prosecutor on January 5, and was told that the Department could not locate the cars. The prosecutor had no prior knowledge that the cars were missing; (3) In December 2007 or early January 2008, Ledesma Jr.'s attorney notified the previous prosecutor that he wished to view both the Saturn and the Toyota Corolla with his investigator and/or expert. The prosecutor told counsel that he should call Inspector Coffey and gave counsel his telephone number.

Closing Arguments

The prosecutor argued that Ledesma Sr. fired the shotgun, Mesaramos fired the automatic pistol, and Ledesma Jr. fired the fatal bullet from the revolver. She contended that each appellant acted with intent to kill, as evidenced by their motive to kill Sureños and the fact that multiple guns were fired, multiple times, at the victims. In his closing argument, Ledesma Sr. asserted that the killing was justifiable homicide (defense of self or another). Mesaramos conceded that he was driving the Saturn and fired the .45 automatic pistol. He argued, nonetheless, that he was guilty of, at most, voluntary manslaughter because "he was not shooting at [the victims] or the Toyota, he was . . . just basically shooting off rounds in reaction to what events are unfolding in front of him." Ledesma Jr. argued that he did not fire a gun and, although he grabbed a gun and ran from the Saturn, he did not know, in advance, that Ledesma Sr. intended to commit any crime. "[H]e was just in the car with his father."

Jury Instructions and Deliberations

The jury was instructed on first degree murder, second degree murder, justifiable homicide (defense of self or another), and on voluntary manslaughter based on imperfect self-defense (CALCRIM Nos. 500, 505, 520, 521, 522, 571). The court declined to give a requested defense instruction on heat of passion voluntary manslaughter. The jury was also instructed on attempted murder and attempted voluntary manslaughter based on imperfect self-defense (CALCRIM Nos. 600, 604).

The jury began deliberations on May 26, 2009. On May 27, 2009, the court considered a jury note requesting the "DNA Report," the "GSR Report," and Ayala's report of Martinez's witness statement. The judge informed the jurors that these documents had not been admitted into evidence and could not be provided. The jury reached its verdict later that day. After sentencing, timely notices of appeal were filed by all three appellants.

II. DISCUSSION

Appellants present numerous claims of error on appeal. Each appellant has largely joined in the arguments made by the others.[24] We address each argument in turn, and find no prejudicial error.

A. *Admission of DNA Evidence Without Statistics*

Ledesma Jr. contends that the trial court erred by refusing to strike Latif's testimony that he could not be eliminated as a possible contributor to the mixed sample of trace DNA found on the revolver cartridges.[25] He argues that Latif's testimony was inadmissible without statistical evidence. He also argues that admission of the disputed DNA evidence violated his right to due process.

" 'A person's individual genetic traits are determined by the sequence of base pairs in his or her DNA molecules. That sequence is the same in each molecule

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[24] See California Rules of Court, rule 8.200(a)(5) (permitting a party to "join in or adopt by reference all or part of a brief in the same or a related appeal").

[25] Appellants do not challenge any of the other DNA evidence admitted at trial.

regardless of its source . . . and is unique to the individual. Except for identical twins, no two human beings have identical sequences of all base pairs. . . .' [Citation.] [¶] 'Because there is no practical way to sequence all three billion base pairs in a person's DNA, forensic scientists seek to identify individuals through variations in their base-pair sequences at polymorphic DNA locations (loci) [, where the sequence of base pairs varies from person to person]. Each variation in a [base-pair] sequence . . . is called an "allele." . . . In the absence of a nonmatch that conclusively eliminates the suspect as the source of the crime scene sample, each match between alleles from the suspect and from the crime scene may be accorded statistical significance.' [Citations.]" (*People v. Cua* (2011) 191 Cal.App.4th 582, 592–593.) To do so, "the DNA profile of the matched samples is compared to the DNA profiles of other available DNA samples in a relevant population database or databases in order to determine the statistical probability of finding the matched DNA profile in a person selected at random from the population or populations to which the perpetrator of the crime might have belonged." (*People v. Soto* (1999) 21 Cal.4th 512, 518.)

1. *Background*

Latif testified that the profile developed from the swab taken from cartridges in the revolver's cylinder indicated a mixture of two individuals. Neither Ledesma Sr. or Ledesma Jr. could be eliminated as contributors, but Mesaramos was eliminated as a contributor. Latif did not compute random match probability statistics for this mixture profile and was not sure why she had not.

Approximately two weeks after the prosecution's DNA expert had given the above testimony, and a week after his own expert had testified, Ledesma Jr. moved to strike this portion of Latif's testimony, on the ground that her conclusions were inadmissible without any accompanying statistical information. In his moving papers, Ledesma Jr. argued: "The danger of allowing this testimony to stand is readily apparent. The jury may easily conclude from testimony that Mr. Ledesma Jr. 'cannot be eliminated,' that his DNA is in fact on these items." At the hearing on the motion, Ledesma Jr.'s counsel argued: "I'm saying this is a [Evidence Code section] 352 situation. It's so prejudicial,

and the fact that it's clear that my client's DNA may not be on the items, but, because of the way she testified, the way that her report was written, it comes across to the jury as the danger of inferring that he's on those items, when he could just as well not be on the items . . . . [¶] . . . [¶] . . . All these cases hold [that DNA conclusions] mean little or nothing without statistical reference provided . . . . [¶] . . . [¶] I think it's really, really harmful to put that in front of a jury and let them make their own inferences." The prosecutor argued in response that the absence of statistics went to the evidence's weight, not its admissibility.

Ledesma Jr.'s motion was denied. The trial court noted: "I'm not going to strike the testimony. It is not required that each and every piece of the prosecution case prove absolute total guilt, completely in and of itself . . . . That's not required for it to be admissible. [¶] In thinking about this, I was thinking, in the old days when all we had was the A-B-N-O, that we would frequently have testimony concerning that even though vast parts of the population had one of those things, but it was not that jurors needed to hear about what testing was done to keep them from speculating about what might have been done or might not have been done, and it was important that in some instances somebody could be excluded. [¶] I frankly don't think that anyone with a high school science education and reasonable intelligence will have any difficulty understanding the significance or the lack of significance of this particular testimony . . . . [¶] As a practical matter, in fact, the DNA has little or nothing to do with whether these firearms were in possession of the [appellants], given the location that they [were] obtained, given the ballistics from the scene where the shooting occurred. [¶] Frankly, it's a little bit like most of the gunshot residue testimony, which in this case, as in a couple others I've seen recently, has little or nothing to do with proving anything; it's more a matter of showing that tests were done and that—frankly, it doesn't mean much."

2. *Analysis*

Ledesma argues that Latif's testimony was inadmissible without statistical evidence. He relies on *People v. Barney* (1992) 8 Cal.App.4th 798 (*Barney*), in which Division Three of this district held that DNA evidence, obtained using the restrictive

fragment length polymorphism (RFLP) method, was inadmissible. At the time, a scientific debate was ongoing regarding the effect of population substructuring on probability calculations made using the unmodified product rule. Because of the unresolved debate, the court concluded that the methods used to statistically evaluate a match were not generally accepted in the scientific community. (Id. at pp. 802, 806, 819–822.) In deeming the DNA match evidence inadmissible, the court reasoned: "The error infects the underlying match evidence, which is incomplete without an interpretation of its significance. [Citation.]" (*Id.* at p. 822.) In considering whether the *Kelly-Frye* requirement of general scientific acceptance applied to the statistical calculation step of DNA analysis,[26] the *Barney* court also stated: "The statistical calculation step is the pivotal element of DNA analysis, for the evidence means nothing without a determination of the statistical significance of a match of DNA patterns. [Citation.]" (*Id.* at p. 817.)[27]

Unlike the defendant in *Barney*, Ledesma Jr. has never argued that the methods used by Latif were not generally accepted by the scientific community. No *Kelly* hearing was held in this case. The question is not whether Latif's failure to perform statistical

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[26] In *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), our Supreme Court held that "the proponent of expert testimony based on the application of a new scientific technique [must] satisfy three criteria: (1) the technique or method is sufficiently established to have gained general acceptance in its field; (2) testimony with respect to the technique and its application is offered by a properly qualified expert; and (3) correct scientific procedures have been used in the particular case. [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 242; accord, *Kelly, supra,* 17 Cal.3d at p. 30; see also *Frye v. United States* (D.C.Cir. 1923) 293 F. 1013, 1014 (*Frye*) [superseded by Fed. Rules Evid., see *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579].) "[O]ur state law rule is now referred to simply as the *Kelly* test or rule." (*People v. Bolden* (2002) 29 Cal.4th 515, 545.) But, we sometimes refer to the *Kelly-Frye* rule for consistency with prior case law.

[27] In the years since Barney was decided, our Supreme Court has approved both the unmodified product rule and the modified ceiling approach as generally accepted in the relevant scientific community. (*People v. Soto*, *supra*, 21 Cal.4th at p. 541; *People v. Venegas* (1998) 18 Cal.4th 47, 89.)

computations renders the disputed DNA evidence inadmissible under *Kelly*'s third prong. Rather, as noted by Ledesma Jr.'s trial counsel, the issue is properly framed as a question of whether the trial court should have excluded Latif's testimony because its probative value was substantially outweighed by its potential for undue prejudice. (See Evid. Code, § 352.) " '[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative (see Evid. Code, § 352) if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [Citation.]' [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) "Only relevant evidence is admissible (Evid. Code, § 350), and the court has discretion to exclude relevant evidence 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.)" (*Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 647.)

Preliminarily, we note that Ledesma Jr.'s motion to strike would have been properly overruled because it was untimely. Ledesma Jr. should not have been surprised by Latif's testimony, as he received Latif's report, dated November 30, 2005, long before trial. Thus, Ledesma Jr.'s trial counsel could have filed a motion in limine or made a timely contemporaneous objection. He did not. Instead, Ledesma Jr. filed a motion to strike long after Latif provided the disputed testimony. Ledesma Jr. therefore forfeited the argument he raises on appeal by failing to timely present it to the trial court. (Evid. Code, § 353, subd. (a) [a verdict "shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] There appears of record an objection to or a motion to exclude or to strike the evidence *that was timely made* and so stated as to make clear the specific ground of the objection or motion" (italics added)]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 19–22; *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 865 ["[f]ailure to make a timely objection or motion to strike inadmissible evidence constitutes a waiver of the right to

later complain of its erroneous admission into evidence"], disapproved on other grounds by *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15.) Recognizing as much, Ledesma Jr. argues on appeal that his trial counsel was prejudicially ineffective to the extent he failed to make a timely objection.[28]

But, even if we assume that Ledesma Jr.'s trial counsel preserved the Evidence Code section 352 argument, we would find no abuse of discretion in the trial court's refusal to strike the testimony. In this case, Latif did not opine on source attribution—she did not say that Ledesma Jr. left his DNA on the revolver cartridges. She did not even testify that Ledesma Jr.'s profile "matched" the DNA found on the cartridges. Nor, did the People argue as much. The People only argued that the DNA evidence did not exonerate Ledesma Jr. *Barney*, and most of the other authority on which Ledesma Jr. relies, involved expert testimony that a defendant's DNA profile *matched* that of an evidentiary sample. (*Barney, supra*, 8 Cal.App.4th at pp. 803, 804.) We are unaware of any California authority holding that a trial court necessarily abuses its discretion in admitting expert testimony, without accompanying statistical evidence, that the defendant could not be excluded as the source of evidentiary DNA.

We do not read *People v. Wallace* (1993) 14 Cal.App.4th 651 (*Wallace*) to say that *all* DNA evidence is inadmissible without statistical analysis. In *Wallace*, DNA evidence was admitted after the trial court held a *Kelly-Frye* hearing. One DNA expert, FBI Agent Presley, testified that the defendant's DNA profile shared the same pattern as DNA found at the crime scenes, but because of the presence of some extra bands, he

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[28] To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was so deficient that it fell below an objective standard of reasonableness, under prevailing professional norms and (2) that the deficient performance was prejudicial, rendering the results of the trial unreliable or fundamentally unfair. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 692 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216–217.) Reversal for ineffective assistance of counsel is unwarranted unless a defendant can "show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

could not declare a match and could only say that the defendant could not be excluded as the source of the DNA. Another DNA expert, Professor Sensabaugh, testified that the profiles "were indistinguishable" and presented a random match probability of "in excess of one in a million" Caucasians. (*Id.* at p. 657.) On appeal, Division Three held that Professor Sensabaugh's testimony should have been excluded, under *Kelly/Frye,* for want of general acceptance of the method employed to produce his statistical calculation. (*Id.* at p. 659.) In considering whether the error was prejudicial, the court noted that the impact of Professor Sensabaugh's testimony was lessened because Agent Presley would not declare a match of the DNA patterns. The court also noted that the prosecutor did not assert that the DNA evidence was conclusive proof that the defendant was the perpetrator and argued only that it showed he "cannot be excluded." (*Id.* at p. 662.) Because the case against the defendant was otherwise compelling, the court concluded that admission of "the DNA evidence" was harmless. (*Ibid.*) The *Wallace* court did not hold that Agent Presley's testimony, which was analogous to Latif's, was inadmissible.

Ledesma Jr. argues that there is no difference between a "match" and an inability to exclude. Theoretically, he is correct. " 'A determination that the DNA profile of an evidentiary sample matches the profile of a suspect establishes that the two profiles are consistent' [citation]; hence, the suspect cannot be excluded as the source of the evidentiary sample. This determination is of little significance, however, 'if the evidentiary profile also matche[s] that of many or most other human beings.' [Citation.] Thus, while the fact of a match itself is relevant because it means the suspect could be the perpetrator, the probability that he is the perpetrator depends on the frequency with which the genetic profile appears in the population of possible perpetrators, i.e., the rarity of the perpetrator's profile in the population. [Citation.] The rarer the genetic profile, the more likely the suspect is the source of the evidentiary sample. [Citation.]" (*People v. Johnson* (2006) 139 Cal.App.4th 1135, 1147, italics & fn. omitted; accord, *People v. Venegas, supra,* 18 Cal.4th at p. 82; *People v. Pizarro* (2003) 110 Cal.App.4th 530, 541–542, 576, dispproved on other grounds in *People v. Wilson* (2006) 38 Cal.4th 1237, 1250–1251.)

But, in this case, we think Latif's testimony regarding the DNA found on the revolver cartridges made clear that she had not found a match. Latif's testimony had probative value—albeit limited. It was relevant to show that neither Ledesma Sr., nor Ledesma Jr., could be excluded as people who may have handled the cartridges loaded in the revolver. Thus, the evidence tended to show that the revolver was not just a random gun found in a shopping mall parking lot.[29] And, even if there was some risk that the jury would infer, from Latif's testimony, that Ledesma Jr.'s DNA was on the revolver cartridges, this did not necessarily mean that Ledesma Jr. fired the revolver. There was no dispute that Ledesma Jr. had access to the gun after the shooting. And, Latif herself said that finding DNA on an item does not tell you when it was put on the item or how it got there. Thus, we think the trial court reasonably concluded that the jury was competent to weigh Latif's testimony and was unlikely to speculate, in awe of the presentation of DNA evidence of any kind, that Ledesma Jr. must necessarily have loaded and fired the weapon. Under these circumstances, we conclude that the trial court did not abuse its discretion in determining the evidence, that Ledesma Jr. "could not be excluded" as a contributor to trace DNA found on the revolver cartridges, was admissible without random probability match statistics.

Even if we were to assume that the danger of possible confusion was sufficient to compel striking Latif's disputed testimony, we would find any error to be harmless.[30]

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[29] The evidence was also relevant because appellants questioned the adequacy of the police investigation. The fact that the DNA test was performed—even if its results were equivocal—countered appellants' repeated assertions that this case was about "sloppy [police] investigation."

[30] Ledesma Jr. has brought to our attention several cases from other jurisdictions that have held similar nonexclusion testimony inadmissible without supporting statistics. (See *Deloney v. State* (Ind.Ct.App. 2010) 938 N.E.2d 724, 730 [trial court abused discretion—evidence should have been excluded as irrelevant]; *Commonwealth v. Mattei* (Mass. 2010) 920 N.E.2d 845, 848 (*Mattei*) [concluding "that expert testimony that DNA tests could not exclude the defendant as a potential source of DNA found at the crime scene, absent testimony regarding statistical findings explaining the import of such a result, was likely to confuse and mislead the jury such that any probative value of the test

(See *Barney*, *supra*, 8 Cal.App.4th at p. 825 [question is whether it is reasonably probable different result would have been reached absent admission of DNA evidence]; *Strickland*, *supra*, 466 U.S. at p. 694.) Ledesma Jr.'s trial counsel made it very clear to the jury, through cross-examination of Latif and presentation of Fedor's testimony, that no match had been established with respect to the revolver cartridges.[31] And, the People did not argue that a match had been established with respect to the DNA found on the revolver.

Furthermore, contrary to Ledesma Jr.'s contention, the prosecution presented other strong circumstantial evidence that Ledesma Jr. fired the revolver. Ledesma Jr. was a Norteño gang member, in a car with three guns and two other Norteño gang members, who all had a motive to attack the Sureño victims. The evidence showed that the fatal bullet came from the passenger side of the Saturn, where he was seated. Ledesma Jr. suggests this was a close case because Martinez testified that he did not see Ledesma Jr.

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results was substantially outweighed by their prejudicial effect"]; *State v. Tester* (Vt. 2009) 968 A.2d 895, 906–907; *People v. Coy* (Mich.Ct.App. 2000) 620 N.W.2d 888, 896, 898–899; *State v. Williams* (Iowa 1998) 574 N.W.2d 293, 298.) In only one of these cases, did the admission of such evidence constitute prejudicial error. (*Mattei*, *supra*, 920 N.E.2d at pp. 848, 858–859.) In *Mattei*, a home invasion and assault case in which the victim could not identify her assailant, the prosecutor emphasized the nonexclusion DNA evidence in her closing argument—asking the jury to infer from the evidence that the defendant was in fact the assailant. (*Id.* at pp. 858–859.)

[31] The following colloquy occurred during Ledesma Jr.'s cross-examination of Latif: "Q. [O]n 2-1, there's a mixture of two individuals, and you simply say suspect Ledesma Sr. and Ledesma Jr. cannot be eliminated. Correct? [¶] A. Correct. [¶] Q. Doesn't mean that they're there, does it? [¶] A. I cannot eliminate them. [¶] Q. But it doesn't mean they're there, does it? [¶] A. I think it means that their alleles are present in this evidence profile. That's what it means. [¶] Q. So they're kind of there? [¶] A. If you want to interpret it that way. [¶] . . . [¶] Q. . . . [¶] In conclusion here, there is no DNA on any of these weapons where you come up with a figure to show how rare it is on [Ledesma Jr.]. Right? [¶] A. That's correct." Fedor had testified that Ledesma Jr.'s DNA might appear to be on the cartridge because his father's DNA was present. Fedor was also asked: "So in some reports they give you a number, one in 426 quadrillion, is that stronger evidence than, for example, saying somebody can't conclusively be eliminated?" Fedor responded: "I would think that would be much stronger evidence, yes."

do anything. But, Martinez also testified that he turned and ran as soon as the first shot was fired. And, it was implausible that Ledesma Sr. fired both the revolver and the shotgun.[32] Finally, Ledesma Jr. fled and tried to dispose of evidence, including gloves he was wearing, when pursued by police. This behavior was inconsistent with his theory that he was innocently riding in the Saturn with his father. Admission of Latif's testimony regarding DNA found on the revolver cartridges was, at most, harmless error. It did not violate due process. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair"].)

B. *Gang Expert Testimony*

Appellants next argue that the trial court erred when it permitted the gang expert to respond to hypothetical questions regarding intent.

1. *Background*

During direct examination, the prosecutor asked Lage the following series of hypothetical questions:

"Q. . . . I want you to assume that there are three [Sureño] affiliates in front of a house. While they're in front of that house, a car drives by. That car contains two Southside Hayward [gang members] and one Northside Hayward gang member. The house the [Sureños] are in front of is claimed by Southside Hayward as their territory or turf. The car then returns a moment or so later and slows down. When that car slows down, one of the [Sureño] affiliates sees the front passenger's window down. He sees that front passenger holding a shotgun and begins shooting, pointing the gun towards the three [Sureño] affiliates. The car then speeds away after the shooting, is involved in a high speed pursuit, and crashes. The three inside the car flee and dump three firearms along the way. [¶] In your opinion, would that shooting and resulting homicide be done for the benefit of, at the direction of, or in association with a criminal street gang?

[32] Martinez testified that the Saturn was stopped for only three seconds and Ledesma Sr. held the shotgun when it approached.

"A. Yes.

"Q. And why is that your opinion?

"A. Those three Norteño gang members, both the two southside and one northside guy, they all garner that respect, that added infamy for taking part in acts of violence, particularly one where there's actually injuries that result or, in this case, a death as well of [Sureño] gang members who are their hated rivals. By cooperating together in concert this way, again, they test those bonds of mutual loyalty. They add that cohesive trust level between them. It does not just enhance their gang's dual status and the [Norteño] movement, but added prestige and status within the gang subculture. It goes down to their individual credit as well that they have taken part in acts like that.

"Q. . . . Would it benefit just one of their gangs or—

"A. No, it benefits both. . . . I've investigated cases for well over 12 years where Southsides have come up to north Hayward to look for [Sureños]. [Sureños] are fair game wherever they are. [¶] This particular house was in an area that is really more in a very central neighborhood where there's a lot of [Norteños] that live around. This is . . . really what they consider one of their principal turf areas. So that adds to their whole atmosphere of violence and intimidation that further promotes the gangs. It intimidates rivals, adds respect, and also intimidates witnesses. It enables them to continue their criminal activities, not just the violent ones, but their associate drug dealing and this sort. These types of acts intimidate people. They know it's going to make people less inclined to testify against them, to report crimes that they're doing.

"Q. *In your opinion, would the three individuals inside that car have the specific intent to promote further or assist the members in criminal conduct?*

"A. *Yes.*

"Q. Explain what you mean. Explain the basis for your opinion.

"[LEDESMA JR.'S TRIAL COUNSEL]: Your Honor, I'm going to object to him testifying as to the specific intent of what's in the minds of somebody in that car.

"THE COURT: No, overruled, in terms of it's a hypothetical that's being phrased. [¶] So you can go ahead. [¶] . . . [¶]

"Q. . . . [¶] *In your three individuals inside the car in the hypothetical that I've posed to you committing that murder and attempted murder, would they have the specific intent to promote further or assist the criminal conduct when committing that act?*

"A. *Yes, ma'am.* [¶] . . . [¶] *Because . . .they would know that that's what they were for. It's, in my experience, not something that's likely to happen where one or two members in a car of three [Norteños] are going to go to a drive-by shooting and they first drive by the intended target and then come back without all of the members of the car, knowing full well what's coming and being willing participants.*

"Q. How would it promote further or assist Southside Hayward?

"A. It adds to that atmosphere of intimidation in not just that neighborhood but also in the gang subculture at large. . . . It's meant to add prestige and status for gangs collectively and themselves individually."

On cross-examination, Lage was asked: "[M]aybe one of the people in that car had just been picked up moments before and had no idea what was going to happen and it happened on the spur of the moment and they did not know ahead of time. Isn't that possible too?" Lage responded: "Anything is possible."

2. *Analysis*

"In general, this court and the Courts of Appeal have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case. 'Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." [Citation.] The subject matter of the culture and habits of criminal street gangs . . . meets this criterion.' [Citations.] 'Trial courts exercise discretion in determining both the admissibility of evidence under Evidence Code section 352 [citation] and a witness's expert status [citation].' [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) " ' "As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]" ' [Citation.]" (*People v. Garcia* (2007) 153 Cal.App.4th 1499,

1512; accord, *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) However, in general, "a witness cannot express an opinion concerning the guilt or innocence of the defendant. [Citations.]" (*People v. Torres* (1995) 33 Cal.App.4th 37, 46–47.)

Appellants rely on *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*) in arguing that the italicized testimony was inadmissible. In *Killebrew*, the defendant was convicted of conspiring to possess a handgun after police found handguns in and around three vehicles occupied by gang members. Killebrew was seen in the area of one of the vehicles. (*Id.* at pp. 647–648.) On appeal, Killebrew challenged the admissibility of a gang expert's testimony "that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun," arguing "that these opinions on the subjective knowledge and intent of each occupant in the car were improperly admitted." (*Id.* at p. 652, fn. omitted.) The Fifth District Court of Appeal held that a police gang expert's testimony regarding the defendant's subjective knowledge and intent was inadmissible. (*Id.* at pp. 647, 652, 658.) And, because the gang expert's testimony was the only evidence offered by the prosecution to establish the elements of the crime, as against Killebrew, reversal was required. (*Id.* at pp. 658–659.)

Our Supreme Court, however, has expressly limited *Killebrew* and made clear that an expert is not prohibited from answering hypothetical questions regarding the intent of hypothetical persons, but is merely prohibited from opining on the knowledge or intent *of a specific defendant* on trial. (*People v. Vang* (2011) 52 Cal.4th 1038, 1047–1048 (*Vang*).) In *Vang*, the defendants were convicted of assault by force likely to produce great bodily injury. The jury also found that the assault was committed for the benefit of the criminal street gang. (*Id.* at p. 1041.) On appeal, the defendants complained that the prosecution's gang expert was permitted to respond, over defense objection, to two

hypothetical questions, tracking the facts of the case, regarding whether the assault was gang related.[33] (*Id.* at pp. 1042–1044.)

The *Vang* court held that the expert's responses to hypothetical questions, premised on the facts of the case, were properly admitted. (*Vang, supra,* 52 Cal.4th at p. 1052.) The court rejected the argument that the hypothetical questions were impermissible because they too closely tracked the facts of the alleged crime. The court observed: "Use of hypothetical questions is subject to an important requirement. 'Such a hypothetical question must be rooted in facts shown by the evidence . . . .' ([*People v.*] *Gardeley* [(1996)] 14 Cal.4th [605,] 618 . . . .)" (*Vang,* at p. 1045.) The court also stated: "We disapprove of any interpretation of *Killebrew, supra,* 103 Cal.App.4th 644, as barring, or even limiting, the use of hypothetical questions. *Even if expert testimony*

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[33] Specifically, "[o]n direct examination, the prosecutor asked about a hypothetical assault on a 'young baby gangster.' After stating the hypothetical facts, the prosecutor asked: 'Based on the facts of that hypothetical, do you have an opinion as to whether this particular crime was committed for the benefit of and [in] association with or at the direction of the Tiny Oriental Crips street gang?' [The expert] said he did have an opinion based on those facts. He believed that '*they did this to keep the gang strong* because the gang set is only as strong as its weakest member. And that member did something to the TOC gang for him to be victimized in this case. They put him in check. They brought him back in line over some perceived wrong that this individual did to that set, and the victim may not even know what he or she did in this incident.' He stated that the assault would benefit TOC and was committed in association with TOC and at the direction of TOC members. [¶] On redirect examination, the prosecutor stated additional hypothetical facts based on the evidence, and asked . . . 'What is your opinion about the gang motivation behind the attack that has been described in the hypothetical?' [The expert] responded, 'The reason why I feel that *it was gang motivated* is what you told me exactly as far as the fact that this individual, in this hypothetical, is saying that he had been hanging. He had been associating with the documented gang members. He tells me that. . . . There could be a perception or a paranoia from the gang members that are attacking him that he did something to tick off the gang set. *The fact that he was lured out to where he was attacked tells me that that was planned*. The fact that it was done in concert with known documented gang members, that they work together to do what they did to the victim, tells me that *this is a gang-motivated incident*. It wasn't about friends fighting among one another.' " (*Vang, supra,* 52 Cal.4th at p. 1043, italics added.)

regarding the defendants themselves is improper, the use of hypothetical questions is proper." (*Vang*, at pp. 1047–1048, fn. 3, italics added.)

The *Vang* court also rejected the argument that the expert's opinions were inadmissible as opinions on guilt or innocence. The court said: " ' "[O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." ' [Citations.] [¶] . . . The jury was as competent as the expert to weigh the evidence and determine what the facts were, including whether the defendants committed the assault. So he could not testify directly whether they committed the assault for gang purposes. But he properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." (*Vang, supra,* 52 Cal.4th at p. 1048.)

The Supreme Court explained: "To the extent *Killebrew*, *supra,* 103 Cal.App.4th 644, purported to condemn the use of hypothetical questions, it overlooked the critical difference between an expert's addressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves. *Killebrew* stated that the expert in that case 'simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact.' (*Killebrew, supra,* 103 Cal.App.4th at p. 658.) But, to the extent the testimony responds to hypothetical questions, as in this case . . . such testimony does no such thing. Here, the expert gave the opinion that an assault committed in the manner described in the hypothetical question would be gang related. The expert did *not* give an opinion on whether defendants did commit an assault in that way, and thus did *not* give an opinion on how the jury should decide the case. [¶] . . . [¶] . . . The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Vang, supra*, 52 Cal.4th at pp. 1049–1050.)

We see no basis to distinguish Lage's disputed testimony from the opinions presented in *Vang*. Lage did not testify regarding Ledesma Sr.'s, Mesaramos's, or Ledesma Jr.'s knowledge or intent on the night of the shooting. Here, Lage gave the opinion that hypothetical gang members, involved in a drive-by shooting committed in the manner described by the hypothetical question, would have "know[n] full well what's coming and [been] willing participants." It was up to the jury to determine whether to credit Lage's opinion and whether the facts underlying the hypothetical had been proved. The trial court did not abuse its discretion in admitting Lage's opinion.[34]

C. *Destruction of Evidence*

Next, appellants contend that the Department's loss of the two cars violated the due process clause of the Fourteenth Amendment.

"Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence 'that might be expected to play a significant role in the suspect's defense.' (*California v. Trombetta* (1984) 467 U.S. 479, 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976.) To fall within the scope of this duty, the evidence 'must both possess an exculpatory value *that was apparent before the evidence was destroyed*, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' (*California v. Trombetta, supra,* 467 U.S. at p. 489; *People v. Beeler, supra,* 9 Cal.4th at p. 976.) The state's responsibility is further limited when the defendant's challenge is to 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57.) In such case, '*unless a criminal defendant can show bad faith* on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' (*Id.* at p. 58; accord,

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[34] We are aware of no statute prohibiting a gang expert from expressing an opinion similar to that expressed in this case. Thus, appellants' reliance on *People v. Bordelon* (2008) 162 Cal.App.4th 1311 and *People v. Nunn* (1996) 50 Cal.App.4th 1357, is misplaced.

People v. Beeler, supra, 9 Cal.4th at p. 976.)" (*People v. Roybal* (1998) 19 Cal.4th 481, 509–510, italics added & parallel citations omitted.) "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. [Citation.]" (*Arizona v. Youngblood, supra,* 488 U.S. at pp. 56–57, fn. *; accord, *People v. DePriest* (2007) 42 Cal.4th 1, 42 (*DePriest*).) "On review, we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling. [Citation.]" (*People v. Roybal, supra,* 19 Cal.4th at p. 510.)

1. *Background*

Before the taking of testimony, all three appellants moved to dismiss the information or, in the alternative, for sanctions, citing the loss of the cars. Evidence, similar to that presented at trial, was heard on the motions.

The court denied the motions, reasoning as follows: "[T]he law doesn't allow me to simply dismiss cases or throw out evidence because I don't believe that the best investigation possible has been done. [¶] . . . [¶] Now, we have two instances with these vehicles going missing. [¶] On the first one, prior to the preliminary hearing, while hardly best police practices, while it could have been handled much better, the exculpatory value of the evidence was not readily apparent at that time. It seems to me that . . . the case of [*DePriest, supra,* 42 Cal.4th 1] is totally controlling and there's really no sanction that would be appropriate . . . . [¶] We then get to the second loss of these vehicles. It strikes me that there is virtually no excuse for the loss of these vehicles, but I looked to try to see what I could find on this business of what is bad faith for purposes of *Trombetta* and *Youngblood,* and the only thing I can find has to do with this business of whether there was a knowledge of the exculpatory value at the time. [¶] Now, the problem that I have with finding much in the way of exculpatory value as to this second loss of these vehicles is that they weren't in very good shape when they were returned the first time. . . . They had been at Pick-n-Pull for some time. The public had had access to them. There wasn't much there. [¶] . . . [¶] But I'm ruling that . . . I cannot find the bad faith as defined by an

apparent exculpatory value for either the first release of the vehicles, or the second, the loss of the vehicles. [¶] I would be inclined, however—it seems to me that the defense should be able to at least have the jury know that the vehicles were lost. It goes to the nature and extent and the quality of the investigation that was done here. [¶] . . . [¶] . . . And so counsel could argue it for what it was worth. But I can't make an order directing them one way or another as to how they should evaluate that evidence." The jury was ultimately instructed that the "Department had a duty to preserve the vehicles after the Court ordered their preservation. The Jury can consider the evidence as to the vehicles, and their loss. The weight and significance of this evidence, if any, is for you to decide."

2. *Analysis*

We conclude that the trial court's findings—that the evidence did not possess apparent exculpatory value before it disappeared (on either occasion) and that the police did not act in bad faith—are supported by substantial evidence. Quite simply, the evidence shows that the vehicles were in fact examined by one of the appellants, and that further defense testing may, or may not, have tended to exculpate appellants. Fant testified that, if she had been able to examine the two cars, she could "possibly" have determined whether it was impossible for the rear passenger in the Saturn to have fired the fatal shot.[35] She also testified, at trial, that if she had access to the cars she might have done a sodium rhodizonate test on the holes in the Toyota to determine whether they were, in fact, bullet holes. But, there is no indication in the record that the results of such testing were likely to be exculpatory. The trial court properly concluded that the cars had no apparent exculpatory value before they disappeared.

Thus, the *Youngblood* bad faith test applies because the cars were merely "potentially useful evidence." (*Arizona v. Youngblood, supra,* 488 U.S. at p. 58.) And, appellants presented no evidence that "the police knew [the cars] would have exculpated

[35] Fant also testified that, in making such a determination, it would be important to know how the two cars were positioned in relation to one another, as well as where the shooter's arm was positioned.

[them]" at either time the cars were released. (*Id.* at pp. 56–57, fn. *.) It is true that the police had received two court orders mandating preservation of the cars, as potentially exculpatory evidence, before the cars were finally lost. But, the existence of the court orders only establishes a duty to preserve. It does not show that the Department necessarily acted with bad faith in failing to preserve the evidence. Appellants presented no evidence that the Department deliberately destroyed the cars to prevent further defense testing. The fact that the cars were earlier made available for inspection by Ledesma Sr.'s investigator, in fact, belies any such suggestion. In fact, Wydler testified that he released the cars, the second time, because he erroneously believed they could be released after they were examined, in 2005, by Ledesma Sr.'s defense team. Although the police were surely negligent in failing to preserve the two cars, the evidence does not compel a finding of bad faith. Appellants have not shown a due process violation.

Appellants' reliance on *U.S. v. Bohl* (10th Cir. 1994) 25 F.3d 904 (*Bohl*), does not convince us otherwise. In *Bohl*, the defendant's conviction, for using nonconforming steel in the fabrication of radio transmission towers for the Federal Aviation Administration (FAA), was reversed. The government had destroyed the towers themselves after receiving explicit notice that the defendant believed them to be potentially exculpatory. (*Id.* at pp. 907, 913–914.) But, in *Bohl*, "[the] chemical composition [of the steel] was the central issue in the criminal trial" and the defendants' assertion that the tower legs possessed potentially exculpatory value was not merely conclusory. (*Id.* at p. 913.) In fact, the government had reason to believe that further tests on the leg might lead to exculpatory evidence because FAA inspectors had previously inspected and accepted the legs. Additionally, the FAA had received a certificate from defendants' steel suppliers stating that the steel purchased conformed to standards. (*Id.* at p. 911.) Finally, the court considered that the only substitute evidence available to defendants were photos, minimal samples which were too small to test, and the government's challenged testing results. (*Id.* at pp. 908, 913.)

The facts here are distinguishable. Here, there is no evidence that the police had any reason to fear further defense testing would exculpate appellants. Jacobson's

inspection did not bring to light anything that would give the police motive to intentionally destroy the evidence.[36] Further, although the cars were involved in the shooting, defense inspection of the cars was not the only way to establish the circumstances of the shooting. Ledesma Jr. was able to rely on Fant's testimony that Kell improperly used the trajectories, as well as Ledesma Sr.'s testimony, and evidence that the Saturn's rear windows did not roll down, to argue that he did not fire a weapon while seated in the rear passenger seat of the Saturn. Ledesma Sr. relied on testimony regarding the two holes in the Toyota's right fender to support his claim of self-defense. In addition, appellants could argue to the jury, in conformance with the instructions, that they could consider the police's loss of the vehicles during deliberations. No further sanction was warranted.

D. *CALCRIM No. 400*

Ledesma Jr. and Mesaramos argue that they were denied effective assistance of counsel at trial because their trial counsel failed to object to CALCRIM No. 400. The standard of review for an ineffective assistance of counsel claim is well settled. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was so deficient that it fell below an objective standard of reasonableness, under prevailing professional norms and (2) that the deficient performance was prejudicial, rendering the results of the trial unreliable or fundamentally unfair. (*Strickland, supra*, 466 U.S. at pp. 688, 692; *People v. Ledesma, supra*, 43 Cal.3d at pp. 216–217.) Generally, prejudice must be affirmatively proved. (*Strickland*, at p. 693.) As an ineffective assistance of counsel claim fails on an insufficient showing of either element, a court need not decide the issue of counsel's alleged deficiencies before

[36] The facts of this case are much closer to those presented in *DePriest, supra*, 42 Cal.4th at pp. 40–42, in which our Supreme Court determined that no due process violation occurred when police lost a murder victim's car before the defense team could inspect it. In *DePriest*, the defendant relied only on argument that the car contained three unidentified fingerprints that "could have been made by" a third party whom the defendant blamed for the murder. (*Id.* at p. 41.)

deciding if prejudice occurred. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, cert. den. *sub nom. Rodrigues v. California* (1995) 516 U.S. 851.)

The trial court instructed the jury, pursuant to a former version of CALCRIM No. 400, as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."[37] (Italics added.) The jury was also instructed, pursuant to CALCRIM No. 401: "To prove a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to and does, in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty of being an aider and abettor. [¶] If you conclude that [the] defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime, does not itself make her or him an aider and abettor." (Italics omitted.)

Ledesma Jr. and Mesaramos argue that the italicized portion of the instruction was "a misstatement of California law because an aider and abettor may be found guilty of a

[37] CALCRIM No. 400 has since been revised to eliminate "equally" from the "equally guilty" language.

lesser homicide-related offense than the offense the actual perpetrator committed." The People concede, and we agree, that the instruction was potentially misleading.

Our Supreme Court has said: "The statement that an aider and abettor may not be guilty of a greater offense than the direct perpetrator, although sometimes true in individual cases, is not universally correct. Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120 (*McCoy*).)

In *People v. Samaniego* (2009) 172 Cal.App.4th 1148 (*Samaniego*), the Second District concluded that an aider and abettor may be guilty of a less serious crime than the perpetrator. In *Samaniego,* three defendants were convicted of first degree murder of a victim, who had been shot multiple times. There were no eyewitnesses to the crime and therefore no evidence about which defendant was the direct perpetrator. The trial court instructed the jury with a version of CALCRIM No. 400, which included the "equally guilty" language. (*Samaniego*, at pp. 1153, 1157, 1162–1163.) The reviewing court concluded that the "equally guilty" language was misleading. It reasoned: "Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. [¶] . . . [¶] . . . CALCRIM No. 400 misdescribes the prosecution's burden in proving the aider and abettor's guilt of first degree murder by eliminating its need to prove the aider and abettor's (1) intent, (2) willfulness, (3) premeditation and (4) deliberation, the mental states for murder." (*Samaniego*, at pp. 1164–1165.)

The *Samaniego* court determined the error was harmless. The court observed: " 'An instruction that omits or misdescribes an element of a charged offense violates the right to jury trial guaranteed by our federal Constitution, and the effect of this violation is measured against the harmless error test of *Chapman v. California* 386 U.S. 18, 24.'

(*People v. Williams* (2001) 26 Cal.4th 779, 797.) Under that test, an appellate court may find the error harmless only if it determines beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*Samaniego, supra,* 172 Cal.App.4th at p. 1165, parallel citations omitted.) Because the jury also found true the special circumstance allegation that each defendant had acted willfully with intent to kill, the error was harmless. (*Id.* at pp. 1165–1166.)

Here, as in *Samaniego*, it is clear that the verdict would have been no different if trial counsel had objected to the instruction. (See *Strickland, supra,* 466 U.S. at p. 694.) The jury was properly instructed that intent to kill was required in order for the drive-by-murder special circumstance to be true.[38] (See § 190.2, subd. (a)(21).) When the jury found this special circumstance true, as to each appellant, it necessarily determined that each appellant intended to kill at the time of the shooting. The jury also necessarily found that each appellant acted with intent to kill, when it convicted them of attempted murder (Counts 2 and 3). It is inconceivable that the jury would have concluded Ledesma Jr. and Mesaramos intended to kill Martinez and Castañeda, but not Dueñas. Finally, we agree with the *Samaniego* court that "[i]t would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required. [Citation.]" (*Samaniego, supra,* 172 Cal.App.4th at p. 1166.) No prejudice

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[38] The jury was instructed: "The defendant is charged with the special circumstance of committing murder by shooting a firearm from a motor vehicle in violation of Penal Code section 190.2(a)(21). [¶] To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant shot a firearm from a motor vehicle, killing Sergio Duenas; [¶] 2. The defendant intentionally shot at a person who was outside the vehicle; [¶] AND [¶] 3. At the time of the shooting, *the defendant* intended to kill. [¶] A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. [¶] A motor vehicle includes a passenger vehicle." (Italics added.) The jury was also instructed: "You must consider each special circumstance separately for each defendant."

resulted from trial counsel's failure to object to the court's instruction. Absent a showing of prejudice, the claim of ineffective assistance of counsel necessarily fails.

E. *Trial Counsel's Failure to Request an Instruction on Voluntary Intoxication*

Appellants contend that their trial counsel were ineffective in failing to request an instruction on voluntary intoxication. We disagree. There was no substantial evidence that any appellant's intoxication affected his ability to form the specific intent required for the charged offenses.

A jury may consider evidence of voluntary intoxication as relevant to whether a defendant actually formed the specific intent necessary for the charged crime. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1126, 1133 [evidence of intoxication relevant to awareness of direct perpetrator's purpose to establish culpability of aider and abettor]; accord, § 22, subd. (b) ["[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought"].) Likewise, "[p]roof of intoxication tends to support a claim of honest but mistaken belief in an imminent aggravated assault, providing a reason to account for the defendant's objectively unreasonable belief." (*People v. Cameron* (1994) 30 Cal.App.4th 591, 601.) As appellants recognize, however, "a trial court has no sua sponte duty to instruct on the relevance of intoxication." (*People v. Mendoza*, at p. 1134; accord, *People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

A defendant is entitled to an instruction on voluntary intoxication "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 677.) "The fact that a defendant has been drinking, without evidence that he became intoxicated thereby, provides no basis for an instruction on intoxication. [Citations.]" (*People v. Sanchez* (1982) 131 Cal.App.3d 718, 735, disapproved on other grounds in *People v. Escobar* (1992) 3 Cal.4th 740, 752.) When the evidence is, at best minimal, a trial court may properly refuse a defendant's request for a voluntary intoxication instruction. (*People v. Roldan* (2005) 35 Cal.4th 646,

716, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Williams, supra,* 16 Cal.4th at pp. 677–678; *People v. Williams* (1988) 45 Cal.3d 1268, 1312, disapproved in part on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 560–561.)

In *People v. Williams, supra,* 16 Cal.4th 635, the defendant was convicted of first degree murder. A witness testified that the defendant was " 'probably spaced out' " on the day of the killings. Defendant himself had told the police that he was " 'doped up' " and " 'smokin' pretty tough' " at the time. (*Id.* at p. 677.) The Supreme Court affirmed the conviction and found no error in the trial court's refusal to give a voluntary intoxication instruction. The court reasoned: "Assuming [the] scant evidence of defendant's voluntary intoxication would qualify as 'substantial,' there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent." (*Id.* at pp. 677–678.)

The facts of this case are similar. Ledesma Sr. testified to consuming relatively small amounts of alcohol over a long period of time on the day of the shooting. He also testified to "getting high" earlier in the day. Ledesma Sr. was asked: "How many beers did you have?" He responded: "All day? I don't know. Maybe one. I don't know. Two. I don't know. I like to drink." Ledesma Sr. also testified that Ledesma Jr. called for a ride because he was "drunk" and then stated he was "really buzzed" when he got into the car. Ledesma Sr. said that Mesaramos "might have been partying; he might have been doing nothing." This is not substantial evidence of intoxication. But, even if we assume all appellants were intoxicated, there was no evidence before the jury to explain what, if any, effect such intoxication had, or would have, on each appellant's ability to form the requisite intent or mental state pertinent to the crimes in question. Trial counsel did not render ineffective assistance by failing to request an instruction that would have been correctly refused by the trial court. There was no error.

F. *Heat of Passion Voluntary Manslaughter*

Appellants claim that the trial court erred by refusing to instruct on voluntary manslaughter on a heat of passion theory. The trial court did not err.

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) When a defendant commits an unlawful killing but lacks malice, he is guilty of only manslaughter. (§ 192.) There are two types of voluntary manslaughter: (1) a killing that occurs on a sudden quarrel or heat of passion, based on provocation, and (2) a killing committed because of the actual but unreasonable belief in the need to defend against imminent death or great bodily injury. (*In re Christian S.* (1994) 7 Cal.4th 768, 773; *People v. Breverman* (1998) 19 Cal.4th 142, 153–154 (*Breverman*).) "Because heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such a homicide [citation], voluntary manslaughter of these two forms is considered a lesser necessarily included offense of intentional murder [citation]." (*Breverman,* at p. 154, italics & fn. omitted.)

The heat-of-passion theory has subjective and objective components. To be guilty of heat-of-passion manslaughter, the defendant subjectively must have acted in the heat of passion and the circumstances must be such as would give rise to such passion in an " 'ordinarily reasonable person.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) " ' "[N]o specific type of provocation [is] required . . . ." ' [Citations.]" (*Breverman, supra,* 19 Cal.4th at p. 163.) But provocation must be of such character and degree as to cause an ordinarily reasonable person of average disposition " ' "to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' [Citations.]" (*Ibid.*)

With or without a request, a trial court must instruct on any lesser included offense if there is substantial evidence from which a trier of fact could reasonably conclude that the defendant is guilty of the lesser offense, but not the greater offense. (*Breverman, supra,* 19 Cal.4th at p. 162.) We independently review whether the trial court erred in failing to instruct on defenses or lesser included offenses. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

Appellants argue substantial evidence of provocation was presented at trial. They rely on *Breverman, supra,* 19 Cal.4th 142, and Ledesma Sr.'s testimony that he saw a gun

pointed in his direction. But, *Breverman* does not suggest that a heat of passion manslaughter instruction is required whenever self-defense is at issue. In *Breverman*, our Supreme Court held that it was error not to give instructions on *both* heat of passion and unreasonable self-defense theories of manslaughter. The court reasoned: "[T]here was evidence that a sizeable group of young men, armed with dangerous weapons and harboring a specific hostile intent, trespassed upon domestic property occupied by [the] defendant and acted in a menacing manner. This intimidating conduct included challenges to the defendant to fight, followed by use of the weapons to batter and smash defendant's vehicle parked in the driveway of his residence, within a short distance from the front door. Defendant and the other persons in the house all indicated that the number and behavior of the intruders, which defendant characterized as a 'mob,' caused immediate fear and panic. Under these circumstances, a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*Id.* at pp. 163–164, fn. omitted.)

Our Supreme Court has since explained that its holding, in *Breverman* was limited to the facts of that case. "Nothing in *Breverman* suggests an instruction on heat of passion is required in every case in which the *only* evidence of unreasonable self-defense is the circumstance that a defendant is attacked and consequently fears for his life. In *Breverman* there was affirmative evidence that the defendant panicked in the face of an attack on his car and home by a mob of angry men and had come out shooting, and continued shooting, even after the group had turned and ran." (*People v. Moye* (2009) 47 Cal.4th 537, 555.) In this case, there was no substantial evidence of provocation sufficient to arouse the heat of passion in an ordinarily reasonable person. Ledesma Sr. did not testify that he panicked. His testimony, if believed, did not describe provocation,

but rather only a killing in self-defense, either reasonable or unreasonable.[39] The jury was fully instructed on both theories. The trial court did not err.

G. *CALCRIM No. 1403*

Appellants next contend that the trial court erred in instructing the jury, pursuant to CALCRIM No. 1403, that it could consider evidence of gang activity in evaluating Ledesma Sr.'s credibility. The trial court instructed the jury as follows: "You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related special circumstances allegations charged; [¶] OR [¶] The defendant had a motive to commit the crime charged. [¶] *You may also consider this evidence when you evaluate the credibility or believability of a witness* and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." (Italics added.)

As far as we can discern, appellants are arguing that the instruction was problematic because it did not limit the "gang activity" that could be considered by the jury, in evaluating Ledesma Sr.'s credibility, to Northside Hayward gang activity. According to Ledesma Sr., "[i]t was error to allow most, if not all, of [the] gang evidence [introduced at trial] to be used in determining [his] credibility, because most of this evidence was unrelated to him."

First, we must observe that appellants' trial counsel did not raise any objection to, or request any modification of, CALCRIM No. 1403. Thus, we could conclude that

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[39] "For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation.] To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable. [Citations.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, fn. omitted.)

appellants forfeited the argument raised on appeal. "Generally, ' "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." ' [Citations.]" (*Samaniego, supra*, 172 Cal.App.4th at p. 1163.) Even assuming that the argument has been preserved for appeal, we reject it.

In *Samaniego*, none of the three alleged gang member defendants testified at trial. Nonetheless, the court concluded that "CALCRIM No. 1403 correctly states the law and the evidence justified inclusion of the optional motive and witness credibility paragraphs." (*Samaniego, supra,* 172 Cal.App.4th at pp. 1162, 1168–1169, 1170.) The court began by observing: "Gang evidence is . . . relevant on the issue of a witness's credibility. [Citations.]" (*Id.* at p. 1168.) The prosecution's gang expert had testified that gang members often retaliate against "snitches." (*Id.* at p. 1161.) Because "[a]t trial, several [nondefendant] witnesses testified differently than at the preliminary hearing or in prior statements given to police[,] . . . [t]he disparities in the witnesses' testimony justified use of gang evidence to provide a plausible explanation for them." (*Id.* at p. 1169.)

In this case, the instruction on credibility was supported by the evidence for similar reasons. Lage testified, on cross-examination, that gang members are expected to refuse to implicate other gang members and Norteños will frequently "take the wrap [*sic*]" for other Norteños. According to Lage, a gang member could be the target of gang retribution if he implicated other members through his testimony. The defense expert provided similar testimony. The jury could properly consider this expert testimony in weighing Ledesma Sr.'s testimony that he shot both the revolver and the shotgun.

Ledesma Sr. asks us to conclude that *Samaniego* is not applicable in this case because it did not address the impact of gang evidence on the credibility of a testifying defendant. (*Samaniego, supra,* 172 Cal.App.4th at p. 1162.) We see no basis for such a distinction. " '[B]y taking the stand, defendant put his own credibility in issue and was subject to impeachment in the same manner as any other witness.' [Citations.]" (*People v. Doolin, supra,* 45 Cal.4th at p. 438.)

Nor do we think that there is a reasonable likelihood that the jury applied the instruction in the way Ledesma Sr. suggests—by concluding, from the evidence of prior crimes committed by Southside Hayward members, that Ledesma Sr. had a disposition for criminal activity. "In determining the correctness of jury instructions, we consider the instructions as a whole. [Citation.] An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) In addition to CALCRIM No. 1403, the jury was instructed pursuant to CALCRIM Nos. 226 and 316. CALCRIM No. 226 told the jury that it should use its common sense and experience when judging the credibility of a witness and that it could consider anything that tends to prove or disprove the truth of the witness's statements, including, inter alia, such factors as whether the witness's testimony was influenced by a bias, the witness's attitude about the case, whether the witness made prior inconsistent statements, and *whether the witness had engaged in conduct that reflected on his or her believability*. CALCRIM No. 316 told the jury that *if it found a witness had a felony conviction or that a witness committed a crime or other misconduct*, it could consider that fact only to evaluate the witness's credibility; that neither the felony conviction, nor the crime nor the misconduct necessarily destroys or impairs the witness's credibility; and that the jury should decide what weight to give the evidence.

The instructions as a whole did not suggest that jurors should consider crimes committed by Southside Hayward gang members to conclude that Ledesma Sr. was not worthy of belief. Nor did the instructions as a whole instruct the jury to conclude that Ledesma Sr. was not telling the truth merely because he engaged in gang activity. The instructions merely informed the jury to consider gang activity as one factor in evaluating the truth of Ledesma Sr.'s testimony. We presume jurors use intelligence and common sense when applying instructions. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396.)

H. *Admission of DVD Showing Test-Firing*

Appellants contend that the trial court abused its discretion by allowing the prosecution to play a DVD showing Dilbeck's test-firing of the shotgun and the pistol.

They argue that the trial court should have excluded the footage because its probative value was substantially outweighed by the potential for undue prejudice (Evid. Code, § 352).

As we stated previously we " 'appl[y] the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations].' " (*People v. Jablonski, supra,* 37 Cal.4th at p. 805.)

1. *Background*

When the People sought to play the recording for the jury, Ledesma Jr.'s trial counsel objected, saying: "I want to object under both relevance and a 352 argument. [¶] We've received already extensive evidence, the tests, the results, even a description of how the guns were fired. I don't see how it's relevant to have this jury just simply watch these guns be fired by an individual into a water tank. It's all been described to them. We've received the test results; we've received the testimony from this expert witness. [¶] How is that relevant? I think it's just duplicative. And I don't know whether it might even be inflammatory to the jury to be watching these guns go off. Certainly I would say it's not relevant at this point. What do we need it for?" Ledesma Sr. and Mesaramos joined in the objection.

In response, the prosecutor argued: "[T]he relevance is that there were implications . . . that at least on the part of Frank Ledesma Jr., the argument would be made that two people in that car were firing the guns, all three of the guns. [¶] And with regard to the shotgun, I think it's relevant for this witness to testify about the type of kick, the type of impact that this type of gun has when you shoot it, that you need two hands to fire it, what it takes to then rack the next round, that when you rack the next round, the shell gets expelled, and . . . the amount of force that this type of gun has when you fire it is very relevant given that the argument is going to be that someone in the front seat may have been firing two guns. [¶] . . . [¶] The revolver had not been able to be test-fired, so it was test-fired through this contraption that's used. It's very difficult to understand how that contraption works. So the revolver is shown being fired in the equipment that's been

described. [¶] And . . . the cases, cartridge cases, get ejected out of the pistol. On the DVD, the test-firing of the gun shows those cartridge cases being ejected. . . . [¶] In addition, even with regard to the shotgun, again, not only the kick of it, but the racking it. And we know that a shell was in the back seat of the car. . . . [¶] So I would submit that it's very relevant given especially the insinuation in argument that I would expect to come from the defense."

The court overruled appellants' objections, in part, explaining its ruling as follows: "This is an urban area in the Bay Area and the level of ignorance concerning firearms seems to be almost overwhelming. So it is quite possible that we have jurors that have never seen a shotgun fired, have never seen rounds ejected, or the use of a pump shotgun. [¶] So there is sufficient probative value that, given the de minimis amount of time involved, there's no problem. [¶] Likewise with the semiautomatic pistol. The manner in which the mechanism is used and the ejection of the [casings], again, given what at least I would perceive as the general ignorance of firearms within this community, there's sufficient probative value, again, given the de minimis amount of time that I will allow that. [¶] I really don't see anything of probative value in the remote test-firing [of the revolver]. . . . I don't see any additional probative value. [¶] You can show it as to the shotgun and the semiautomatic pistol and then end your DVD at that point." The jury was shown a recording, with sound, of the test-firing of the shotgun and semiautomatic pistol, but not the test-firing of the revolver.

2. *Analysis*

First, we reject appellants' argument that the footage should have been excluded as irrelevant. " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

As noted by the prosecutor, the footage demonstrates the kick of the shotgun, that you need two hands to fire it, what it takes to then rack the next round, and the amount of force that this type of gun has when you fire it. Thus, this evidence tended to

show that it was implausible that Ledesma Sr. fired both the revolver and the shotgun during the drive-by shooting, which Martinez testified lasted about three seconds. The footage also shows the shell being ejected from the shotgun and how cartridge cases are ejected out of the pistol. This evidence was relevant to explain the physical evidence—five casings from the semi-automatic pistol found in the street, and an expended shotgun shell in the Saturn. The trial court did not abuse its discretion in concluding that the footage had probative value.

We have reviewed the recording, which has a total duration of two minutes, and conclude that the trial court, likewise, did not abuse its discretion in concluding the prejudicial effect of the test-firing footage was unlikely to distract the jury from its legitimate inquiry. Ledesma Sr. argues: "The firing of guns, especially to jurors who do not fire guns, was most likely scary. Watching these guns being fired, and listening to them being fired, probably caused at least some jurors to react in an emotionally negative manner toward [Ledesma Sr.], because he fired two of the three weapons." But, the footage was not violent—it merely showed the guns being fired in a controlled environment. The evidence was not unduly prejudicial, especially considering the other evidence in this case.

I. *Cumulative Error*

Finally, appellants argue that the cumulative effect of the trial court's errors require reversal of the judgment. We have largely rejected appellants' arguments on the merits. Any errors that we have identified or assumed, for the sake of argument, were harmless, whether considered individually or collectively. Appellants were entitled to a trial "in which [their] guilt or innocence was fairly adjudicated." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) They received such a trial.

J. *Gang Enhancement Imposed on Count One*

The trial court sentenced each appellant to life without the possibility of parole on the first degree special circumstances murder conviction. The trial court also imposed,

but stayed, 10-year gang sentencing enhancements under section 186.22, subdivision (b)(1)(C).[40]

Appellants argue that the enhancements were unauthorized because they were sentenced to life without the possibility of parole. They implicitly rely on section 186.22, subdivision (b)(5), which provides: "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." The People concede that the gang enhancements, applied to Count 1, should be stricken. We disagree.

Appellants and the People rely on *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*), in which our Supreme Court said: "Section 186.22[, subdivision] (b)(1)(C) does not apply . . . where the violent felony is 'punishable by imprisonment in the state prison for life.' [Citation.] Instead, section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole." (*Lopez,* at p. 1004.)

Lopez is distinguishable. Lopez had been sentenced to 25 years to life for first degree murder, rather than life without the possibility of parole. (*Lopez, supra,* 34 Cal.4th at p. 1005.) The Supreme Court held that a defendant who commits a gang-related violent felony that is punishable by life imprisonment is not subject to the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) but, rather, is subject to a minimum parole eligibility term of 15 years under section 186.22, subdivision (b)(5). (*Lopez,* at pp. 1010–1011.) The court noted, in its analysis of the relevant legislative

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[40] Section 186.22, subdivision (b)(1)(C), provides: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] . . . [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

history: "[A]t the time the [California Street Terrorism Enforcement and Prevention Act (STEP Act)] was enacted, the predecessor to section 186.22[, subdivision] (b)(5) was understood to apply to *all* lifers, *except those sentenced to life without the possibility of parole*." (*Lopez*, at p. 1010, italics added.)

Appellants were sentenced to life without the possibility of parole for having committed special circumstance first degree murder. It would therefore make no sense to subject such a term to a minimum parole date under section 186.22, subdivision (b)(5). Accordingly, we conclude the trial court properly imposed, but stayed, the enhancements under section 186.22, subdivision (b)(1)(C).

K. *Parole Revocation Fine*

The trial court imposed on each appellant a $5,000 parole revocation fine, pursuant to section 1202.45.[41] Appellants argue, and the People concede, that the parole revocation fine should be stricken because they were each sentenced to life without the possibility of parole. Again, the People have conceded too much.

" 'When there is no parole eligibility, the [parole eligibility] fine is clearly not applicable.' [Citations.]" (*Samaniego, supra*, 172 Cal.App.4th at p. 1184, citing *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) But, the above cases involved no determinate terms. Our Supreme Court has said, in a case involving a death sentence, as well as several determinate terms: "[Former] Section 3000, subdivision (a)(1) provides that [a determinate term imposed under section 1170] 'shall include a period of parole.' Section 1202.45, in turn, requires assessment of a parole revocation restitution fine '[i]n

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[41] Section 1202.45 provides: "In every case where a person is convicted of a crime *and whose sentence includes a period of parole*, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine . . . shall be suspended unless the person's parole is revoked. Parole revocation restitution fine moneys shall be deposited in the Restitution Fund in the State Treasury." (Italics added.)

every case where a person is convicted of a crime and whose sentence includes a period of parole.' The fine was therefore required . . . . [¶] . . . [D]efendant here is unlikely ever to serve any part of the parole period on his determinate sentence. Nonetheless, such a period was included in his determinate sentence by law and carried with it, also by law, a suspended parole revocation restitution fine. Defendant is in no way prejudiced by assessment of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked." (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075–1076.) Because appellants were also sentenced to determinate prison terms for the attempted murders, the parole revocation fines were properly assessed.

III. DISPOSITION

The judgments are affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Simons, J.